Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TOMMY J. BARROW
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Corrected
Petition for a Writ of Certiorari

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112PD

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Appellate Court's Refusal to Issue a Certificate of Appealability Violated Petitioner's 5th and 14th Amendment Right to Due Process and Equal Protection And Amounts To a Sanctioned Departure From The Usual Course of Proceedings Where The Tax Deficiency Upon Which Petitioner Was Convicted Did Not Result from the Criminal Proceeding But Was the Legal "Tax on the Return" as Originally Filed.

II. Whether The Appellate Court's Refusal to Issue a Certificate of Appealability Violated Petitioner's 5th and 14th Amendments Rights to Due Process and Equal Protection And Amounts To a Sanctioned Departure From The Usual Course When the Tax Upon Which Petitioner Was Convicted Was Computed In Direct Proscription of the Tax Laws And Petitioner Is Actually Innocent.

III. Whether The Appellate Court's Refusal to Issue a Certificate of Appealability Violated Petitioner's 5th And 6th Amendment Rights to Due Process And a Fair Trial And Amounted To a Sanctioned Departure From The Usual Course of Proceedings When The Trial Court Failed to Follow The Law Which Required A Finding Be Made that the "Other Wrongful Acts" Admitted at Trial Under Fed.R.Evid 404(b) Actually Occurred And Where the Acts Were Later Revealed Not To Have Occurred But Not Subjected to Required Legal Harmless Error Analysis.

IV. Whether the Appellate Court's Refusal to Issue a Certificate of Appealability Violated Petitioner's 6th Amendment Right to Effective Assistance of Trial Counsel And Amounted To a Sanctioned Departure From The Usual Course of Proceedings Where Multiple Deficient Acts By Trial Counsel Rendered Counsel Constitutionally Ineffective

In Violation of The Sixth Amendment to The Constitution of the United States.

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are:

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Respondent
Solicitor General of The United States
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In addition, petitioner is an individual and not a corporate entity. See Supreme Court Rules 14.1(b) and 29.6.

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Thomas J. Barrow, petitioner, respectfully requests that a writ of certiorari issue to review the refusal to issue a certificate of appealability by the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 16, 2000.

OPINIONS BELOW

The judgement of conviction in the lower court was entered on September 28, 1994. Petitioner filed a direct appeal on June 14, 1995 . While the direct appeal was pending, on February 9, 1996, petitioner filed a pro se motion for certification for a new trial based upon newly discovered evidence which was denied on May 9, 1996 and on January 27, 1997, the appeals court affirmed that denial (Appendix B). On July 2, 1997, the court of appeals affirmed petitioner's convictions (Appendix A).

On July 2, 1998, petitioner filed a Amended and Corrected Motion Under 28 USC §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and a Request For An Evidentiary Hearing. Both were referred to a United States Magistrate.

On July 22, 1999 the magistrate issued a Report and Recommendation (Appendix C) recommending that the Motion be denied. On August 2, 1999, petitioner filed objections to the magistrates report and on October 8, 1999, the district court issued its Order Accepting the Magistrate Judge's Report and Recommendation and Judgment for Respondent (Appendix D).

On August 6, 1999, Petitioner filed a motion for issuance of a certificate of appealability and on October 15, 1999, the district court issued its Order Granting in Part and Denying in Part Petitioner's Request for Certificate of Appealability (Appendix E). The motion being granted as to a single issue.

On October 20, 1999, petitioner appealed the denial which the Sixth Circuit treated as an application for a certificate of appealability and on March 29, 2000, a judge of the court declined to issue a certificate of appealability (Appendix F) and on June 16, 2000, a request for a rehearing was denied (Appendix F). This appeal follows.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)[1] and Federal Rules of Appellate Procedure 22(b). The judgment of the court of appeals was entered on March 29, 2000; petitioner's request for rehearing was denied on June 16, 2000 and this application was filed within 90 days of the appellate court's rehearing denial and is thus timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the following Constitutional, Statutory Provisions and Rules will be found in Appendix D.

- U.S. Constitution, Amendment V
- U.S. Constitution, Amendment VI
- U.S. Constitution, Amendment XIV
- 28 U.S.C. §2255–Motion To Vacate, Set Aside or Correct a Sentence
- 28 U.S.C. §1254(1). Courts of appeals; certiorari; certified questions of judgment or decree.
- Federal Rule of Appellate Procedure 22(b). Consideration of certificate applications by the court of appeals

STATEMENT OF THE CASE

The facts of this case are straightforward and for the most part uncontested. Petitioner was a certified public accountant and majority shareholder of his own accounting firm. Beginning in 1984, he was also chairman of a local hospital which experienced financial difficulties in early 1988. The hospital's difficulties necessitated that

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[1]Authority of this court to review denials of issuance of certificates of appealability by a United States Court of Appeals was decided in Hohn v United States , 524 U.S. 236 (1998).

petitioner and his accounting firm perform professional services for the hospital reconstructing its accounting records. In early 1989, the hospital missed a payment on its mortgage at the same time petitioner was seeking local elective office. It was then that petitioner and the hospital's board learned that prior to their involvement, the hospital had obtained a federally guaranteed HUD mortgage. Resultantly, the bank holding the guarantee called the loan and HUD initiated an investigation of the hospital's business practices. Because of petitioner's profile, the government leaked elements of their investigation to the local newspapers which generated a number of stories portraying petitioner in an unflattering light. In early 1990, petitioner resigned as chairman.

Prior to petitioner's resignation, both he and the hospital's board were cleared of any wrongdoing. However, the fact of the sensational newspaper stories put pressure on HUD to act to make it appear related. To that end, they initiated a referral to law enforcement agencies based upon a fictitious[2] claim that petitioner had secretly taken $1.2 million dollars from the hospital and deposited it into his political campaign. This bogus referral caused IRS, FBI, Postal inspectors and Office of Inspector General agents to initiate investigations of petitioner and all of his business and personal dealings.

On September 28, 1994, a jury convicted petitioner of one count of making false statement in connection with a bank loan application, in violation of 18 U.S.C. § 1014 (Count One); one count of bank fraud, in violation of 18 U.S.C. § 1344 (Count Two), three counts of income tax evasion, in violation of 26 U.S.C. § 7201 (Counts Five, Nine, and Eleven); and six counts of making or subscribing false tax returns or false amended tax returns, 1 in violation of 26 U.S.C. § 7206 (Counts, Six, Ten, and Twelve through Fifteen)

Conviction Counts 5 and 6

The conviction on counts 5 and 6 were for the 1985 tax year and

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[2]After trial, petitioner learned the genesis of the investigation from a 1996 HUD Freedom of Information request.

based upon petitioner's failing to report $9,700 in income. The government claimed that the income had generated a $5,474.37 (a 62.5% tax rate) Alternative Minimum Tax ("AMT") and a $436.00[3] Self Employment Tax ("SET") which petitioner had evaded when he failed to report the income.

Petitioner's filed 1985 personal income tax return before the criminal trial had indicated adjusted gross income of $55,676.92 and deductions of ($73,692.33)[4] resulting in negative taxable income of ($18,015.41). Because there was no taxable income, petitioner originally reported a zero tax due on the return. The government, however, claimed that the missing income caused an AMT which petitioner had evaded. Being unfamiliar with the AMT, both the jury and petitioner believed that the income had caused the tax. Thus petitioner's only defense was that he had not received a Form 1099 reporting the "miscellaneous income" to him and that two years later he had simply forgotten it when he prepared his tax return. Ostensibly, because he was a CPA, he was not believed as such a claim seemed incredulous. Thus the perception was that the missing $9,700 had caused the tax.

Subsequent to trial, petitioner retained new counsel who in preparation for the sentencing phase on the tax loss under U.S.S.G §2T4.1, affiliated with an experienced tax attorney for the first time

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[3]The $436 SET was considered immaterial and never addressed by the courts. The AMT was seen as the basis of the conviction, however, the SET too had nothing to with the criminal trial.

[4]The deductions were from petitioner's "Schedule A-Itemized Deductions" form on the 1040 and composed of $32,013.00 of interest from a business partnership; $6,475.90 and $6,433.08 of interest from an automobile leasing business he owned and reported on Schedule C; $10,731.73 in taxes; $2,275.00 in contributions and $19,433.62 in interest from home mortgage, credit card and other loans.

ever. The expert asked to review the government's AMT calculation[5] for 1985 as well as other evidence underlying petitioner's convictions for 1987 and 1988. Just prior to the hearing, the expert revealed two facts which mitigate that petitioner is actually innocent of counts 5 and 6. First that the AMT deficiency upon which petitioner had been convicted did not arise from the $9,700 of income in the criminal trial. Rather the IRS had taken the original return and simply filled out a Alternative Minimum Tax Form 6251 to arrive at the AMT. They completed a Form SE for the SET. Petitioner learned for the first time that adding in the $9,700 from the criminal proceeding resulted in the AMT and SET being the same both before and after the criminal proceeding as the same.

Second, the expert revealed that the AMT that the government did compute was indisputably wrong because the agent in his zealousness had included proscribed business interest[6] in its computation. The expert revealed that a properly computed AMT Form 6251 omitting the proscribed business interest would cause the AMT to legally become zero[7].

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[5] Trial counsel did not associate with any tax expert to review the government's tax calculations. On the Monday before trial, when counsel revealed that one had re-computed the deficiencies, petitioner himself searched the yellow pages until he found an novice accountant who would agree to re-compute the deficiencies. The accountant admitted that he had never been involved in a criminal trial before or even computed an AMT. He made the same errors as the government and later recanted in a sworn affidavit.

[6]The business interest was the $6,475.90 and $6,433.08 of interest from petitioner's automobile leasing business and the $32,013.00 of business interest paid by the equipment leasing partnership both of which were on petitioner's Schedule A-Itemized Deductions.

[7]On 11/9/2000 at 11:37am, independent IRS agents, Stephen Wernert, his supervisor manager Stan Smolinsky and IRS District Counsel Eric Skinner have now acknowledged this error in a meeting with petitioner's counsel but refuse to put

At the May 31, 1995 hearing, petitioner's new counsel placed the fact of the errors on the record. Prior to the hearing, counsel made repeated requests of the government for their supporting trial AMT calculation. The government refused until new counsel petitioned the court who ordered that the calculation used at trial be turned over in advance of the hearing. The government still did not do so and was fined. It was only at the end of the hearing that the government *sprang* the calculation on the defense and it confirmed the expert's discovery[8]. It had indeed included the proscribed business interest in the calculation. Moreover, it confirmed that the deficiency, albeit it wrong, had arisen from the original return and therefore was not a legal deficiency under the law. The government has never denied their error or claim that the expert's findings were in error.

While incarcerated, petitioner attempted to explain the issue telephonically to his appellate counsel[9] who agreed to focus the fact of the government's error and the lack of a legal deficiency. However, after the appeal was filed petitioner learned that counsel failed to make any mention of these matters, instead raising a tortured claim of a constructive amendment to the indictment[10] leaving the distinct impression that the AMT was valid and arose from the criminal proceeding.

Petitioner filed a pro se five page supplement on direct appeal in

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it in writing.

[8]By springing it on the defense in the midst of testimony the defense was unable to quietly analyze the calculation until after the hearing and succinctly point it out the discrepancies on the form to the court.

[9]Appellate counsel was different from his post trial counsel because of his area of specialization.

[10]Counsel claimed that the government constructively amended the indictment because they proved the tax "deficiency" element of the evasion charge by proving an AMT while they had alleged that petitioner had evaded an income tax.

which he attempted to explain both the bogus nature of the deficiency and its genesis from the original return. On July 2, 1997 the Court of Appeals affirmed petitioner's convictions without ever addressing petitioner's supplement choosing instead to address only appellate counsel's constructive amendment argument holding that "the government proved that [the] . . . *underreported income cause[d] an AMT deficiency* " United States v Barrow, 1997 FED App. 0199P (6th Cir.) 97a0199p.06 and dismissing his other claims as squabbles with the prosecutor.

While his direct appeal was pending, on February 9, 1996, petitioner filed a Motion for Certification for New Trial Based Upon Newly Discovered Evidence. Ostensibly raising the discovery at sentencing that the AMT calculation was bogus. The district court denied the motion holding that under U.S. v Seago, 930 F.2d, 482,488 (6th Cir. 1991) "the evidence should have been discovered earlier with due diligence". The appeals court upheld the denial finding that "defendant is attempting to re-litigate his case under a new theory by hiring a new lawyer and a new expert to reinterpret the legal significance of evidence that was either presented or available at trial, namely defendant's 1985 tax return". Barrow v United States, 96-1687. United States v Barrow, 1997 FED App. 0199P (6th Cir. 1997). In point of fact, the erroneous AMT calculation had never been revealed prior to the sentencing hearing. No court has ever directly addressed the truth of the matter asserted.

On July 2, 1999, Petitioner filed a Motion to Vacate pursuant to 28 U.S.C. §2255 alleging that his conviction on counts 5 and 6 were obtained in violation of his 5th, 6th and 14th amendment rights to due process, effective counsel, and equal protection of the law. Simultaneously, petitioner also filed a motion for an evidentiary hearing to determine factually if the AMT calculation was in error.

The magistrate denied both petitioner's request for an evidentiary hearing and recommended that the Motion to Vacate be dismissed.

Conviction Counts 9-15

Petitioner was also convicted on counts 9-15 for diverting $88,015.00 from his accounting firm to himself. Petitioner never disputed that

he had received the funds belonging to the company and nor that he had deposited them directly into his bank account.

In proving its case, the government also proved that petitioner's accounting firm had *negative* earnings and profits[11] at the time of the diversion as well as large outstanding loans owed to him petitioner by his firm. Under the law in petitioner's circuit, however, the evasion boiled down to whether petitioner had reported the funds to his company as a non-taxable repayment of his outstanding loans or secreted the receipt of the funds and never intended to tell anyone, thus evading tax on the income. The government claimed that absent any entry in the books and records of petitioner's company to the contrary, the income was his own. Petitioner could not refute the inference and the prima facie case of evasion set forth in Davis v. United States, 226 F.2d 331 (6th Cir. 1955) .

Davis (supra) stood for the proposition that diverted corporate income creates an inference and establishes a prima facie case of income tax evasion. Such inferences must be refuted or the full economic benefit is conferred upon the sole shareholder as taxable ordinary income. In petitioner's case, to refute the inference, the government had to prove that petitioner had not made any entry in the company's books and records recording a repayment on his outstanding loans and which could account for the missing income. To this end, its IRS agent testified that he had analyzed the records of the accounting firm from 1984 through 1992 and that there existed no entry to record a reduction of petitioner's outstanding loans [TR, Wesley Bulik, 09/20/94, P138, 11-25] [Sen Tr.05/31/94, P103 and P105]. Thus the existence of such a loan entry was focal to proof of petitioner's innocence as it refuted the Davis inference.

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[11]This matter was certified by the district court for appeal as the law on corporate diversions in this circuit and announced in Davis v. United States, 226 F.2d 331 (6th Cir. 1955) conflicts with the tax law on such diversions as well as IRS regulations and the uniformed rulings in other circuits which hold that a taxpayer can have no income from a diversion if the corporation has no earnings & profits.

Petitioner took the stand in his own defense claiming that what he did was proper because the funds went to reduce the amounts the firm owed to him. He claimed that he did make an entry in the company's books to reflect a repayment of his loans. He claimed that he could not prove it because the government would not let him have personal access to his records. [TR, Tommy Barrow,09/24/94, P43, 11-12].

Access to the company's tax return work papers generated in the normal course of the preparation of his tax returns and access to its complete accounting records was essential to prove innocence[12]. However, the government refused counsel's request for petitioner to have such personal access. Counsel again asked and the request was again refused. Thus, despite the crucial nature of the evidence, trial counsel never petitioned the court like new counsel but simply accepted the prosecutor's refusal.

However, the prosecutor did say he would allow a investigator, Morris Culver[13] to see the accounting firm's records. Petitioner vigorously objected because Culver was completely unfamiliar with the records and would simply not know where to begin to look. Despite petitioner's loud protests, Culver was dispatched and returned announcing that he could find no indication of any entry in the books of the accounting firm. Thus counsel did not predicate any defense upon this crucial fact.

After trial and in preparation for the evidentiary hearing, petitioner's new counsel did motion the court and the court ordered access. Upon being placed with tax and financial records for the first time, petitioner performed the analysis and was able to prove at sentencing that the missing hospital income had been recorded as a loan repayment and supported the amended corporate tax returns. The

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[12]By the time of trial, the government had petitioner's firm's records some four years. They had asked for them as part of the criminal investigation. See Motion to Vacate, pages 48-52.

[13]Mr. Culver was a retired IRS collection officer. He was not a CPA, not an accountant and completely unfamiliar with the accounting firms records.

fact of this exculpating evidence was never seen because the government had denied petitioner access to his own records and a ineffective counsel never asked the court. The outcome of this trial would have been different had petitioner had access to his records.

Other Wrongful Acts Evidence

Because petitioner's defense included a lack of intent and wilfulness and because intent and/or wilfulness are element(s) of a violation under 26 U.S.C. §7201 and 26 U.S.C. §7206, the court permitted the government to introduce "other wrongful acts" evidence pursuant to Fed. R. Evid. 404(b).

Of the four "other wrongful acts" introduced at trial only two related to the tax counts. First was a believed false 1993 tax return and second was a certification from the State of Michigan that petitioner had not filed any state tax returns from 1984 through 1992. The additional acts were introduced by the government during its presentation on bank counts 1 and 2 and specifically related to another bank.

On September 13, 1994 the court held a hearing on the government's motion in limine to permit "other acts" evidence. In deciding the motion, the court properly ascertained whether the evidence was "relevant and admissible for a proper purpose"; and second whether the evidence was probative of a material issue other than character. However, the court made no finding as to the truthfulness of the evidence itself, despite the laws requirement that he do so. Petitioner objected claiming that three of the acts were not wrongs at all and would be prejudicial.

The Believed Fraudulent 1993 Tax Return[14]

The government believed that this fraudulent tax return would prove that petitioner was acting wilfully and intended to file fraudulent returns for 1987 and 1988. This was because the 1993 return was the

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[14]By 1993 petitioner had gotten married and his new wife, afraid of the IRS, insisted that they file their 1993 tax return which they did in early 1994 several months prior to the criminal trial.

only tax return filed by petitioner since the IRS' investigation had began and its facts were identical to those in counts 8 through 15.

In 1993, as in 1987 and 1988, petitioner had again deposited receipts from clients of the firm directly into his personal bank account and did not reflect the deposits on his personal tax return. Like 1987 and 1988, he claimed that this was proper because he intended them to be repayments of his outstanding loans.

Like counts 9-15, petitioner had based this claim upon the existence of large loans still owed to him and his firm's negative earnings and profits. Further, he claimed that it was his practice and method of accounting to make an entry to reflect a reduction of his outstanding loans whenever he filed the applicable tax returns and that the entry was reflected. The government, claimed that the return was fraudulent and that petitioner and his new wife had evaded income taxes to get an $11,000 tax refund.

In point of fact, the government claimed (1) in its opening argument; (2)during trial testimony; (3) during direct cross examination;(4) in its closing argument; (5) in its rebuttal; (6) in its Brief on Direct Appeal and; (7) in its November 21, 1996 oral argument before the Sixth Circuit; (8) in its response to the motion for new trial and; (9) in its brief on appeal of the motion for new trial, that the 1993 tax return was fraudulent.

The IRS' Later Independent View

Subsequent to trial, an unrelated independent IRS examination of the 1993 tax return authoritatively refuted the government's claim and found the return to be proper. The agent issued his 4549-CG report in which it made no material change to petitioner's 1993 tax return and issued petitioner and his wife their $11,000 refund. The finding was affirmed on December 18, 1997, by the District Director of the IRS in a 891 (DO) letter. The upshot of this authoritative and independent analysis is that the substantial trial testimony was entirely false and prejudicial.

When addressing this point in the motion to vacate, the magistrate's report *missed* the point entirely dismissing this claim because

petitioner did not explain why it was not fraudulent under the law in Davis. In fact, Petitioner's loan repayment is precisely why it was not fraudulent as it refuted the inferences in Davis. But no matter what the IRS' reasoning, the return was not fraudulent and the evidence false. The claim was never subjected to harmless error analysis as it required by law and thus it prejudice on the jury and petitioner's character.

Failure to File 1984-1992 State Tax Returns

The other piece of "other wrongful acts" evidence related to the later revealed false certification from the State of Michigan. As was customary in these kind of cases, petitioner's counsel had recommended that he not file any tax returns after the IRS began its criminal investigation in 1989. Following that advice, petitioner testified that he deliberately had not filed returns from 1989 until 1992 on counsel's advice. Thus this claim did not hurt him as to those years. His counsel explained during the hearing on the motion in limine that such was his typical advice during these type proceedings.

Petitioner claimed that the certification from the state was false as to 1984 through 1988. To support his claim, he presented copies of canceled checks, state income tax returns and bank statements showing the deductions from his account for the payments. All in possession of the government. He claimed that this proved that the certification was in error. For 1984, he claimed that he was due a refund so no check was applicable.

Despite this overwhelming evidence that the certification was erroneous, the court nonetheless proceeded to permit the entire certification to be presented and represented as true. This created the inference that defendant's evidential documents were false.

Four months after the trial the state notified the government that the certification was in error and that the 1985, 1986, 1987 and 1988 returns had indeed been filed and paid. They claimed that 1984 still could not be located. The magistrate refused to consider this issue instead referencing the district court's denial of the motion for new trial. In that denial, the court held that the evidence was not newly

discovered and was only a portion of the overall other acts evidence. Again, formal harmless error analysis under Chapman v California, 386 U.S. 18,-24, 87-S.Ct. 824, 828,17 L.Ed.2d 705 or Brecht v Abrahamson, — U.S. , —, 113 S.Ct. 1710, 1722, 123 L.Ed2d 353 (1993) has never been applied.

REASONS FOR GRANTING THE WRIT

While petitioner admits that he is unskilled in writing legal briefs. This case, nonetheless has far reaching implications because petitioner is factually innocent of counts 5 and 6 as no legal deficiency existed. As importantly, however, is this case's governmental retaliatory genesis, only this court's consideration will prevent such phony investigations which result in criminal convictions of innocent people based upon mistakes which go undetected at criminal trial.

I. There Can Be No Tax Evasion When There Is No Tax Resulting From The Unreported Income.

To convict a defendant for tax evasion, under 26 USC §7201, one of the elements the government must prove beyond a reasonable doubt is the existence of a tax deficiency resulting from the unreported income. See United States v. Daniel, 956 F.2d 540, 542 (6th Cir. 1992). Thus the focal question here is whether there is a tax deficiency when the tax results from a improper calculation of the numbers on the tax return as filed and not from the criminal proceeding.

It is a settled principle of tax law that a tax which results from a clerical or mathematical error are not deficiencies under the law. This issue was considered in Murray v Commissioner, 94-1 USTC §§50,243. Here the court held that "section 6213(b)(1), in turn provides that a assessment arising out of a mathematical or clerical error "shall not be considered a notice of deficiency" for the prupose of conferring jurisdiction upon the Tax Court under section 6312(a). The statute further provides that "the taxpayer shall have no right to file a petition with the Court based upon such notice." 26 U.S.C. §6213(b)(1).

Thus, a tax deficiency ostensibly results only from the amount the tax

which arises taxpayer from a properly computed Form 1040 line 38[15] compared to the amount that the line becomes when adding in the unreported income and *properly* computing that same line. Such a holding is axiomatic in tax law.

In petitioner's case, he was convicted on counts 5 and 6 for failing to pay $5,474.37 in alternative minimum tax ["AMT"]. However, that AMT (albeit it wrong in any case) did not result from the unreported income but the government simply taking the original return and calculating it[16]. Thus, the AMT and SET were the same both before and after the criminal proceeding had the original return been properly calculated in the first place and not a deficiency under the law.

Moreover, IRC §§ 1311(a), §1314(a) and §6211(b)(1)(3), defines the manner by which a tax deficiency is determined. It makes clear that a legal tax deficiency only arises after the IRS has began with a correctly computed originally filed error free tax return. IRC Section 1314 provides that:

> (a) ASCERTAINMENT OF AMOUNT OF ADJUSTMENT.-In computing the amount of an adjustment under this part there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of tax previously determined shall be the excess of -- (1) the sum of- (A) the amount shown as tax by the taxpayer on his return (determined as provided in section 6211(b)(1),(3), and (4) relating to the definition of deficiency), if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus there shall then be ascertained the increase or decrease in tax previously determined which results solely from the correct treatment of the item which was the subject of the error (with due regard given to the

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[15]Line 38 of the 1985 tax return is the line on which the taxpayer enters the tax and is the "Tax on the Return"

[16]This claim is subject to Issue Number 2 in this petition which alleges that the AMT was calculated erroneously.

effect of the items in the computation of gross income, taxable income, and other matters affected) See 1986 Code-Subtitle A, Ch. 1Q, Part II, Section 1314(a)

Taking this section's reference to §6211(b)(1),(3) and (4) and the applicable case law one is provided the legal definition of a "tax deficiency" and the principle that the "Tax on the Return" is the original return's tax corrected by the IRS. Section 6211 states that: "(a) ...in the case of income. . .taxes. . .the term 'deficiency' means the amount by which the tax imposed ...exceeds the excess of ...(1) the sum of : (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount shown as the tax thereon. . ." Thus to figure out what is the "amount shown on the return as the tax", one must look to the case law.

In Hudson Dugger Co. v Commissioner, 7 BTA 357 (1927), the taxpayer filed a tax return indicating an amount of tax due on the appropriate line. Upon examination, the government computed a tax higher than the number the taxpayer showed on his original return, but lower than the tax derived from the original return if it had been computed correctly in the first place. The Court held that it had no jurisdiction because the §6211 "Tax On The Return" was higher than the tax the government computed and therefore no legal tax deficiency existed.

In Conforte v Commissioner, 692 F.2d 587, 589 (9th Cir. 1982), the proper "tax" on a taxpayer's filed return was held to be the tax found when the 1040 is properly computed and free from errors. Conforte stood for the proposition that:"If the forms submitted show the amount of tax owed, as in this case, or *otherwise permit the Service to calculate a proper tax liability to be claimed by the taxpayer.* Then they are sufficient to be considered a "return" for purposes of §6211 (a) (1)(A) "Tax on Return". (Emphasis added)

Each of the authorities cited stand for the proposition that the "Tax on the Return" is not simply a number on the back of the form 1040, but an amount which the Secretary is able to compute from the forms submitted and which results from a proper calculation of the figures contained on the forms.

In this case, the petitioner submitted a tax return for 1985 which provided all of the information necessary for the Secretary to compute both an AMT and SET. The tax due on that return is the tax resulting from that filed return being made error free by the Secretary before adding in any unreported income. To do otherwise would be to criminalize mistakes. Petitioner was denied the benefit of §1311-1314 and §6211(b)(1)(3) .

When the district court refused to conduct a evidentiary hearing, claiming that these clear holdings do not stand for this proposition, it denied petitioner the equal protection of these laws. Moreover, it could be no more fundamental in tax law that there can be no evasion if the "tax on the return" is exactly the same both before and after the criminal proceeding and tax results from the unreported income.

This issue is recommended to the Supreme Court because the district court refuses to conduct a evidentiary hearing to determine if the tax arose from the criminal proceeding. Moreover, the court understands that for the tax not to have arisen from the original return would reflect adversely upon petitioner's trial counsel who is well regarded by the court as well as the court itself.

II. The District Court Is Required to Conduct an Evidentiary Hearing When a Claim, If True, Would Prove Factual Innocence.

Petitioner was convicted on counts 5 and 6 for failing to pay $5,474.37 of AMT purportedly resulting from $9,700 of unreported income. In truth, however, the AMT calculation improperly included proscribed business interest in its calculation in violation of the law.

AMT is a tax imposed under §55 of the IRC. The computation of the tax begins with a taxpayer's alternative minimum taxable income base defined as "the taxable income of the taxpayer for the taxable year ...increased by the amount of the items of tax preference..." See IRC §55(2). A taxpayers "taxable income" is a function of "adjusted gross income" minus a taxpayer's "itemized deductions" or the "standard deduction" and exemptions, whichever is higher. Thus any item which reduces "adjusted gross income" reduces the taxpayer's AMT base

and affects the AMT.

When the government sprang their AMT calculation on petitioner at the sentencing hearing, petitioner discovered for the first time that their calculation had improperly included three elements of business interest specifically prohibited by law. While the government did not question the deductibility of the interest or the fact that it was indisputably *business* related. The largest ($32,013) was from a business equipment leasing firm and arose from petitioner's partnership Schedule K-1 where it was designated as being from "Net Leased Property".

The instructions published by the IRS for Form 4952, Investment Interest and entitled "Net Leased Property" state to "Deduct the pro rata share of allowable interest from a *partnership* or S Corporation on Schedule A, (Form 1040), *unless* the partnership or corporation notifies you that all or part of it relates to *net leased property*. That part of it should be deducted on Schedule E (Form 1040)" (emphasis added).

By Correctly placing this deduction alone on Schedule E, it reduces "adjusted gross income" and eliminates the government's $5,474.37 AMT. Correcting for the other automobile leasing business interest, only reduces the adjusted gross income further and further eliminates the tax.

The court refuses to conduct a evidentiary hearing to ascertain the truth despite the fact that its truth proves factual innocence on counts 5 and 6. The government, now fully aware, has never refuted that they made the mistake. In fact, on November 9, 2000, independent IRS agents Stephen Wernert and his supervisor Stan Smolinski and district counsel for the IRS, Eric Skinner admitted in a final meeting conference with petitioner's counsel that the mistake has been made.

This issue is recommended to the Supreme Court because absent this court's intervention, petitioner will remain convicted for a crime he did not commit. Moreover, the district court will not conduct a hearing because proof of this fact would reflect adversely upon trial

counsel who is well regarded by the court.

III Before Permitting Evidence Under Fed.R.Evid 404(b) The Court Is Required To First Ascertain That The "Wrongful Acts" Actually Occurred

The government introduced only two pieces of "other wrongful acts" evidence during its presentation of the tax evasion portion of the trial. As a CPA, petitioner's credibility and believability were crucial to proving his innocence as it was an easy for the jury to believe that a CPA could navigate around the tax law. Indeed, the presentation of canceled checks to refute the false State of Michigan evidence appeared entirely fabricated. The fact that the 1993 return was identical to that for 1987 and 1988 and was being alleged to be fraudulent caused the jury to prejudicially see petitioner as a liar and slick.

Under the law in United States v. Gessa, 971 F.2d 1257, 1261-62 (6th Cir. 1992)(en banc). The district court is required to follow a three not two step process before admitting evidence under Fed.R.Evid. 404(b). The first step in the consideration process was to "...[make a] factual determination that the prior act occurred" id at 1261. The district court never made this factual determination i.e. that a fraudulent 1993 tax return had actually been filed. It could never make such a finding because there had never been any body that had made such a determination. When it permitted the use of such evidence, it set up a test of character specifically prohibited by Fed.R.Evid.404(b).

Relatedly, despite overwhelming proof that the state of Michigan certification was false with respect to 1984-1988, the court permitted it to be represented as entirely true in all respects and thereby set up a further test of petitioner's character specifically prohibited by 404(b) because he had evidence of its mistake but instead he appeared slick and deceitful which caused the jury to see him that way through the trial and thereby deny him a fair trial.

This issue is recommended to the Supreme Court because the district court will not admit its own error in not making the required first

finding.

IV Evidence Admitted Under Fed.R.Evid 404(b) And Later Discovered to Have Been False Must Be Subjected to Harmless Error Analysis Required by Law.

Because the "other acts" evidence was false but focal in the presenting the government's case in chief, its falsity must be subjected to harmless error analysis under either Chapman v California, 386 U.S. 18,-24, 87-S.Ct. 824, 828,17 L.Ed.2d 705 (harmless beyond a reasonable doubt standard) or the test enumerated under Brecht v Abrahamson, — U.S. , —, 113 S.Ct. 1710, 1722, 123 L.Ed2d 353 (1993) (substantial or injurious effect or influence upon the jury) when raised on habeas.

Neither the magistrate nor the district court has ever applied such harmless error analysis despite its clear applicability. In a Chapman style analysis, "the beneficiary of a constitutional error is required to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v California, 386 U.S. 18,-24, 87-S.Ct. 824, 828,17 L.Ed.2d 705. While in Brecht v Abrahamson style analysis, petitioner must prove how the error "had a substantial or injurious effect or influence upon the jury," Houston v. Dutton, 50 F.3d 381, 386 (6th Cir. 1995) citing Brecht v Abrahamson, — U.S. , —, 113 S.Ct. 1710, 1722, 123 L.Ed2d 353 (1993) citing Kotteakos v United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946). Brecht has been modified in that "grave doubt about harmlessness [is] to be resolved in favor of petitioner"citing O'Neal v McAninch, —U.S.— (1995) citing Kotteakos.

When this claim was raised on habeas, the magistrate dismissed them as "harmless" but never conducted harmless error analysis under any standard. In fact, the magistrate did not even mention either Chapman or Brecht . A similar case occurred where the reviewing court simply used the word but failed to conduct the review. That reviewing court held that because

"This court is [the] the first court to review the error . . .[it] is required to conduct harmless error under Chapman rather than Kotteakos." Rickman v Dutton, 864 F. Supp 686 (M.D. Tenn. 1994) citing Starr v Lockhardt, 23 F.3d 1280, 1292 (8th Cir. 1994; Orndorff v Lockhardt, 998 F.2d 1426, 1430 (8th Cir. 1993) *cert. denied*, 511 U.S.—,—, 114 S.Ct. 1631, 1633, 128 L.Ed.2d 354, 356 (1994).

This issue is recommended to the Supreme Court as the district court will not admit its own error as the false evidence was so focal during the governments case in chief and could never have been harmless.

V Petitioner Did Not Receive a Fair Trial When the Cumulative Effect of Multiple Deficient Acts by Trial Counsel Amounted to Ineffective Assistance.

The Supreme Court established a two prong approach to evaluating claims of ineffective assistance in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the "defendant must show that counsel's performance was deficient. [i.e.] . . . that counsel's representation fell below an objective standard of reasonableness, as judged simply by prevailing professional norms." Id. at 687-88. Second, "the defendant must show that the deficient performance prejudiced the defense." id at 691.

Petitioner claimed in issue 7-1 of the Motion To Vacate that counsel performed a deficient act when he failed to affiliate or associate with any tax expert for purposes of ascertaining the government's compliance with the tax laws as well as the tax calculations. As a result, petitioner was prejudiced when counsel failed to discover that the AMT was bogus and that the AMT being alleged was unrelated to the unreported income.

In dismissing this claim, the magistrate relies on petitioner's

own last minute search through the yellow pages which resulted in finding an inexperienced novice accountant who would look at the calculations. However, the magistrate overlooks the fact that counsel never discussed the case with the accountant and in fact questioned him for the first time on the stand at trial. The novice accountant, also being unfamiliar with an AMT, made the same errors as the IRS agent and later recanted.

The magistrate simply repeats the district court's virtues of trial counsel which are not based upon the facts in this case but the court's personal perception of counsel. Finally, the magistrate does not seek the truth which would have been revealed in a evidentiary hearing, but instead chooses to rely upon the court's absurd claim in its denial of petitioner's motion for new trial that "petitioner's new interpretation of the AMT would not likely result in an acquittal" Barrow v U.S., 1997 WL 31427 at *2.

Such a irrational gratuitous statement by the district court flies in the face of the fact that without an AMT, there is no deficiency and without a tax deficiency resulting from the unreported income, there is no violation of the tax law. Such a statement by the court is positioned to foreclose any ineffectiveness claim against trial counsel whom the court holds in high regard.

The court denies petitioner due process with it refuses to conduct a evidentiary hearing to ascertain the truth to discover that business interest, proscribed from a personal AMT calculation, is present in the government's AMT and petitioner is actually innocent on counts 5 and 6.

The second deficient act, described in Issue 7-2 was also related to counsel's failure to affiliate with a tax expert. In a tax case, unless counsel himself was proficient in income taxes, and he was not, such a failure fell well below prevailing norms for attorney's in these type cases.

Petitioner was prejudiced when counsel, unaware that the tax deficiencies being alleged, albeit wrong in the case of the AMT, were unrelated to the $9,700 of unreported income for 1985, failed to predicate any defense surrounding this crucial fact. Further, even the SET was always on the return under the tax law.

The magistrate addressed this claim at page 19 of his report not applying the rule of law in *Strickland* but rather the district court in its May 9, 1996 denial of the motion for new trial where the court held that "the authority cited by [petitioner] does not stand for the unusual proposition that the government during a prosecution under 26 U.S.C. 7201 must prepare a new tax return which correctly computes his tax deficiency" 05/09/96, Order at 7.

The district court completely miscomprehends the claim. While the IRS may not have to re-do a return, any tax deficiency must be related to a tax which arose from the unreported income. When petitioner appealed this denial, the appeals court did not even address this issue at all. *In point of fact, the government itself followed the practice in its tax deficiency computation on counts 9-15 in this case for 1987 and 1988. The amounts which it shows as the "tax" on petitioner's filed return is not the tax actually shown on petitioner's filed 1987 and 1988 tax returns it has been corrected for computation errors.*

The magistrate claims that "petitioner's arguments offer no further support for his position" Report at 20. In fact, petitioner now cites the results of an 1997 IRS research division search which supports this position and routine tax law.

The third deficient act and described in Issue 7-3 was related to counsel's failure to secure an opportunity for defendant to have access to his own books and records and as a result, failed to

discover that the income was actually reported as a loan reduction. The magistrate does not see a deficiency because Mr. Culver was able to see the records and that that was adequate investigation.

In truth, such a denial of access to his own records, denied due process. Unlike the typical case, defendant was a CPA and on trial as such. His entire credibility turned around his proving facts he was asserting. The government's prima facie case based upon inferences set forth in *Davis* (supra) could only be disproved if her could get to the records to prove (as he did after trial) that an entry existed which the government had overlooked for one reason or another.

Petitioner was the only one involved in this case who was familiar with the company's records. When the government would only allow Mr. Culver, Defendant objected vehemently. The protest was not quiet, it was vociferous as to not be allowed access to his own records guaranteed the government of a conviction. The records were freely given to the government at the start of its investigation.

In a adversarial proceeding which turns on refuting the inferences from the deposit of corporate funds into his personal bank account, a prudent attorney would have asked the court just as new counsel did. Because the records were complex and sophisticated, familiarity with them was essential to find the exculpating evidence. In fact, it is likely that Culver never even saw the proper records and would never know that he had not seen them since he did not know what he was expecting to see.

The fourth deficient act, described in Issue 7-7 was also related to counsel's failure to affiliate with a tax expert and as a result failed to discover that under the facts of this case and the tax law, there could be no diversion of corporate income if the company had no earnings and profits at the time of the

diversion. Petitioner was prejudiced when counsel did not even consider a defense predicated upon this fact.

The magistrate addressed this issue in three lines despite its substantial prejudicial effect. Finding that this 1993 argument was not the law in this circuit. This reasoning was based upon *Davis* cited earlier. But in fact, *Davis* had already been rejected by the tax court six years prior to petitioner's trial.

In June, 1988, the tax court decided Truesdell v. Commissioner, 89 T.C. (1987) and in 1989, the IRS issued its Internal Revenue Bulletin, 1989-1 I.R.B.4. (See 1988 A. O. D. Lexis 22; Action on Decision CC-1988-025) disavowing the law in Davis v. United States, 226 F.2d 331 (6th Cir. 1955). Had counsel consulted an expert versed in the tax law, he would likely have learned of the IRS' specific rejection of Davis and would have seen that subsequent cases mitigated that petitioner had violated no law in counts 9-15[17]. Because counsel failed to affiliate with a tax expert, he failed to have any chance to discover these facts and consider a defense and jury instructions involving these holdings.

In all, petitioner's motion to vacate raised numerous deficient acts in which counsel's performance fell below the prevailing professional norm for a tax and bank fraud case. Those acts when exceed the Strickland standard which hold that a defendant has been ineffectively represented when there is " a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" Strickland at 694.

Conclusion

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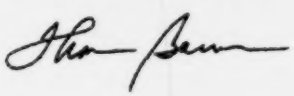
[17]The district court did certify petitioner's issue six for appeal. This issue sets forth the conflict in law announced in *Davis'* and that of the IRS and the uniformed rulings in other circuits.

The claims in petitioner's Motion to Vacate, require that the court hold an evidentiary hearing to ascertain the truth of the claims. Petitioner respectfully requests that this Petition for Writ of Certiorari be granted to ascertain the truth.

Respectfully submitted,



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APPENDIX A

APPENDIX A
ELECTRONIC CITATION: 1997 FED App. 0199P (6th Cir.)
File Name: 97a0199p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TOMMY JOE BARROW,
Defendant-Appellant.

Nos. 95-1686; 96-1577

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 93-81042--George E. Woods, District Judge.

Argued (95-1686): November 21, 1996
Submitted (96-1577): November 21, 1996

Decided and Filed: July 2, 1997

Before: KENNEDY, BOGGS, and WOOD,********** Circuit Judges.

********** The Honorable Harlington Wood, Jr., Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

COUNSEL

ARGUED: Sheldon Light, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellee. Allan S. Rubin, RUBIN & RUBIN, Southfield, Michigan, for Appellant. ON BRIEF: Sheldon Light, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellee. Carl L. Rubin, RUBIN & RUBIN, Southfield, Michigan, for Appellant in 95-1686. Tommy Joe Barrow, Detroit, Michigan, pro se.

OPINION

KENNEDY, Circuit Judge. Defendant, Tommy Joe Barrow, appeals his convictions for making a false statement in connection with a loan application in violation of 18 U.S.C. § 1014, bank fraud in violation of 18 U.S.C. § 1344, income tax evasion in violation of 26 U.S.C. § 7201, and willfully filing false tax returns in violation of 26 U.S.C. § 7206. For the following reasons, we reject defendant's assignments of error.

I. Facts

A. Background

Defendant was a certified public accountant who was the founder, as well as the controlling shareholder, of a Detroit accounting firm, Barrow, Aldridge & Co. In addition, defendant was the sole proprietor of a data processing company, Complete Information Services (CIS). In 1982, defendant was elected to the Board of Directors of Detroit Central Hospital, and in 1986 he became chairman.

During this time, the hospital was renamed New Center Hospital (New Center) and ownership was transferred to a holding company, Central City Health Services (Central

City). By 1986, defendant's accounting firm had become the accounting department for the hospital and the holding company. By 1987, CIS was performing computerized billing services for the hospital and related entities. Around this time, defendant became chief executive officer of both New Center and Central City.

On October 12, 1993, a Grand Jury returned a 15 count indictment against defendant, charging him with making false statements in connection with a bank loan application, 18 U.S.C. § 1014 (Count One); bank fraud, 18 U.S.C. § 1344 (Count Two); income tax evasion in 1984 through 1988, 26 U.S.C. § 7201 (Counts Three, Five, Seven, Nine, and Eleven); and willfully filing false tax returns,[1] 26 U.S.C. § 7206 (Counts Four, Six, Eight, Ten, and Twelve through Fifteen). Following a ten-day trial, the jury acquitted defendant on Counts Three, Four, Seven, and Eight (1984 and 1986 tax evasion and false tax return counts). The jury convicted on all other counts. The following summarizes the general facts pertaining to each count for which defendant was convicted.

B. Convictions

1. False Loan Application and Bank Fraud (Counts One and Two)

In March 1986, defendant applied for a $100,000 loan from Great Lakes Federal Savings (Great Lakes) in order to purchase a boat. In support of his loan application, defendant provided the bank with a personal financial statement, a document purporting to be his 1984 U.S. Individual Income Tax Return (Form 1040), and a document purporting to be his 1985 W-2 Wage and Tax Statement from Barrow, Aldridge & Co. The government presented testimony that the bank relied on these documents

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[1] Defendant was charged with filing a false Individual Income Tax Return, Form 1040, in 1984 through 1988, and was charged with filing a false Corporate Income Tax Return, Form 1120X, in 1988 (First Amendment), 1988 (Second Amendment), and 1989 (Amendment).

in assessing and approving defendant's loan. In May 1986, Great Lakes loaned defendant $105,000 to buy the boat.

The information and documents that defendant submitted to the bank were fraudulent. When he applied for the loan, defendant had not filed a 1984 income tax return; in fact, he did not file his 1984 return until July 13, 1987, over a year after he obtained the loan. Furthermore, the false 1984 return stated that his total income in 1984 was $92,037.69, including $86,920.04 in wages, and that he had paid $15,921.00 in taxes. But the 1984 tax return that he actually filed with the Internal Revenue Service (IRS) in 1987 declared a total income of only $24,059.38, wages of only $39,879.01, and zero tax liability.

Moreover, the 1985 W-2 form that defendant submitted to the bank indicated that his wages from Barrows, Aldridge & Co. were $96,147.29, with federal income tax withholdings of $14,389.56, but the 1985 W-2 form that was filed with the IRS showed wages of only $35,905.94, with no federal income tax withheld. Finally, the figures in the false tax documents corresponded to the figures in the loan application and the personal financial statement.

2. Tax Evasion and False Individual Returns
(Counts Five, Six, and Nine Through Twelve)

Defendant prepared his own individual income tax returns for 1984 through 1988, the years charged in the indictment. In 1989, the IRS began a civil audit of both Barrow, Aldridge & Co. and defendant, focusing in part on information that defendant or his firm had received unreported income from New Center or Central City. The evidence at trial established that defendant had underreported income that he had received in the form of CIS's gross receipts. The unreported income totaled over $29,000 for the years defendant was convicted. In addition to underreporting his CIS income, defendant deducted as a business expense several thousand dollars in payments to a housekeeper who cleaned his personal residence and performed no services for CIS. Defendant also took over $8,000 in unreported income in 1988 by diverting and

depositing into his personal account a check payable to Barrow, Aldridge & Co.

Defendant also received large amounts of unreported income from New Center, Central City, and related entities. Specifically, defendant received compensation for his services as CEO in the form of checks made out to him personally, which he deposited into his personal bank account. This unreported income totaled over $108,000 for 1985, 1987, and 1988.

In total, defendant did not report over $150,000 of income for the years of conviction. Defendant's tax deficiency was $52,000 for those years.

3. False Corporate Returns
(Counts Thirteen Through Fifteen)

Defendant also prepared corporate tax returns for Barrow, Aldridge & Co. During the civil audit of both the accounting firm and defendant, defendant filed three amended corporate income tax returns for the firm. These amended returns purported to increase the reported income of the corporation for the fiscal years ending March 31, 1988 and March 31, 1989, stating that the income of Barrow, Aldridge & Co. was to be increased "due to income inadvertently omitted from Corporate return, however, no tax is due because of available not [sic] operating loss from prior year." The government proved that the amended corporate returns were false because defendant should have claimed the income on his individual tax returns.

C. District Court Proceedings

On October 20, 1994, defendant filed a Motion for Judgment of Acquittal, challenging the evidentiary basis of his tax evasion convictions. On January 29, 1995, the District Court denied the motion. An evidentiary hearing was held concerning sentencing and, on June 5, 1995, defendant was sentenced to concurrent terms of 21 months imprisonment, a fine of $11,000, restitution to Great Lakes

Federal Savings in the amount of $39,000, restitution to the Great Lake Bancorp and to the Internal Revenue Service in the amount of $42,195.71, and a special assessment of $550.

A notice of appeal of the judgment was timely filed on June 14, 1995. This Court entered an order dismissing the appeal on October 4, 1995, but we reinstated the appeal on November 16, 1995. On January 12, 1996, defendant filed his initial brief on appeal. At that point, the government discovered that four documents—the stipulated jury instructions, the government's request for jury instructions, the "defense theory" instructions, and the Government Submission Regarding Jury Instructions—had been omitted from the record. The government filed a motion with the District Court requesting that it correct the record on appeal and make a record of the court's procedure requiring the submission of stipulated and non-stipulated jury instructions. The District Court denied this motion, stating that "[p]laintiff has not explained in its motion exactly why it seeks to add the above items to the record."

The government filed a motion for reconsideration, this time explaining to the court that defendant was challenging the instructions on appeal and that it wished to rely on the "invited error" doctrine. The District Court subsequently granted the government's motion for reconsideration, finding that the government had more adequately explained its reasons and confirming that the documents had been submitted to and considered by the court during the trial. Moreover, the court certified that

> [d]uring the course of the trial in this case, the Court directed the parties to attempt to stipulate to as many of their proposed jury instructions as possible, and to jointly submit the stipulated instructions. The Court further directed the parties to submit to the Court any other instructions to which the parties could not stipulate. . . . Based upon all of these submissions, the Court instructed the jury on September 26, 1994, giving the instructions to which the parties had

> stipulated, supplemented by such additional proposed instructions which this Court found to be appropriate . . . . The Court then allowed the parties to object to the Court's instructions . . . .

Finally, the court ordered that the relevant documents be made a part of the record on appeal.

On April 22, 1996, defendant filed a motion for reconsideration of the District Court's order, arguing that the modification of the record was outside the scope of FED. R. APP. P. 10(e) and would affect the substantive nature of the matter on appeal. Defendant requested that the court at least hold an evidentiary hearing to determine whether the stipulations did in fact occur. Defendant pro se appeals the court's denial of his motion.

We consider both of defendant's appeals in this opinion.

II. Discussion

In both his principal brief and a pro se supplemental brief, defendant makes a number of arguments for reversal of his convictions. In Case No. 95-1686, defendant pro se asserts that there was prosecutorial and juror misconduct, and that evidence presented at sentencing demonstrates that the government's evidence at trial was false. Through counsel, defendant asserts: (1) there was a substantial variance between the allegations of Count Five of the indictment and the government's trial proofs; (2) the District Court committed plain error in instructing the jury that the bank, Great Lakes Federal Savings, was federally insured at the time of the offenses described in Counts One and Two; (3) the District Court erred in failing to instruct the jury that the materiality of the alleged false statement was an element of the 18 U.S.C. § 1014 offense described in Count One; (4) the District Court erred in instructing the jury that overreporting or underreporting income was material as a matter of law; and (5) trial counsel was ineffective. Defendant in his reply brief asserts that the introduction at trial of false evidence mandates reversal. Finally, in Case No. 96-1577, defendant pro se asserts that

the District Court erred when it supplemented the record on appeal pursuant to FED. R. APP. P. 10(e). We consider each of this claims in turn.

A. Supplement to Record on Appeal

We must first determine the composition of the record on appeal. In general, the appellate court should have before it the record and facts considered by the District Court. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982). The District Court does have limited discretion to modify or change the record on appeal. Specifically, FED. R. APP. P. 10(e) allows such modifications in two instances: (1) when the parties dispute whether the record actually discloses what occurred in the District Court and (2) when a material matter is omitted by error or accident[2]. We have not allowed the rule to be used to add new evidence that substantially alters the record after notice of appeal has been filed; rather we have allowed enough modification to ensure the accuracy of the record. *See S & E Shipping Corp.*, 678 F.2d at 641. The term "error or accident" in Rule 10(e) "should be broadly interpreted to permit the record to be supplemented by any matter which is properly a part thereof. Omissions from the record may result from the error or inadvertence of the parties, the court reporter, the district court clerk or the

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[2]Rule 10(e) provides in pertinent part:

> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties, by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.

FED. R. APP. P. 10(e).

judge." 9 MOORE'S FEDERAL PRACTICE ¶ 210.08[1], at 10-53 (2d ed. 1980).

We conclude that the District Court did not err in supplementing the record. As the court explained in denying defendant's motion for reconsideration, "[u]ltimately the [District] Court has direct knowledge of what the parties submitted in this case and of what the Court's own general procedures are." The court certified that these documents were submitted to and used by the court, and it certified a description of its general procedures. We have no reason to disbelieve these certifications. In sum, we believe that the record "has been made to conform to the truth." FED. R. APP. P. 10(e). Accordingly, we will consider the added documents as part of the record of the proceedings before the District Court.

B. Constructive Amendment

Defendant first argues that there was a substantial variance between the allegations of Count Five in the indictment, which charged defendant with tax evasion in 1985, and the government's trial proofs, which established a tax deficiency based on the Alternative Minimum Tax (AMT), 26 U.S.C. § 55. Defendant maintains that if the trial proofs had been confined to the indictment, the evidence would have failed to establish that defendant had evaded taxes for 1985, because even though he underreported income, that income still would not have generated any regular tax liability.

"A variance occurs when 'the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment.' " *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986) (quoting *United States v. Castro*, 776 F.2d 1118, 1121 (3d Cir. 1985)). "In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment." *United States v. Beeler*, 587 F.2d 340, 342 (6th Cir. 1978); *see also United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989). Defendant does not contend that an actual, *i.e.* "literal", amendment

occurred, whereby the charging terms of the indictment were actually altered. *Hathaway*, 798 F.2d at 910. Such an amendment is considered per se prejudicial and warrants reversal of a conviction. *Ford*, 872 F.2d at 1235. Rather, defendant claims that the evidence "in effect" amended Count Five. Such a "constructive amendment" falls somewhere between an actual amendment and a variance. This Circuit has held that a variance rises to the level of a constructive amendment

> when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.

Hathaway, 798 F.2d at 910.

While the distinction between a variance and a constructive amendment is at best "shadowy," *see* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 516, at 26 (2d ed. 1982), the consequences of each are significantly different. A variance will not constitute reversible error unless "substantial rights" of the defendant have been affected. *Hathaway*, 798 F.2d at 910. "Substantial rights are affected only when a defendant shows 'prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions.' " *Id.* (quoting *United States v. Miller*, 471 U.S. 130, 138 n.5 (1985)); *see also United States v. Hart*, 70 F.3d 854, 860 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1368 (1996). A constructive amendment, on the other hand, is "a variance that is accorded the per se prejudicial treatment of an amendment," because, like an actual amendment, it infringes upon the Fifth Amendment's grand jury guarantee. *See Ford*, 872 F.2d at 1235. Consequently, a constructive amendment warrants reversal of a conviction. *See id.* The defendant has the burden of proving the existence of a variance and that such variance is "fatal."

i.e. that the variance affected substantial rights or rose to the level of a constructive amendment. *See United States v. Blandford*, 33 F.3d 685, 701 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1821 (1995).

Count Five of the indictment alleged that defendant had attempted to evade income tax in violation of 26 U.S.C. § 7201. More specifically, the count charged:

> On or about January 11, 1988 . . . defendant TOMMY JOE BARROW . . . did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1985, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent 1985 U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for said calendar year was the sum of $0, and that the amount of tax due and owing thereon was the sum of "NONE," whereas defendant TOMMY JOE BARROW then and there well knew and believed that, his taxable income for the said calendar year was substantially in excess of that heretofore stated, and upon said additional taxable income a substantial additional tax was due and owing to the United States of America.

Section 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title" shall be guilty of a felony. In order to convict a defendant under § 7201, the government must show beyond a reasonable doubt: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or an attempted evasion of the tax. *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992). Defendant claims that the proof at trial regarding the second element of the offense amounted to a constructive amendment of the indictment because the existence of a tax deficiency was established through the AMT, as opposed to through the regular tax provisions. Defendant also asserts that the affirmative act for which he

was convicted was failure to file Form 6251, the AMT Computation Form, as opposed to underreporting of income, as alleged in the indictment.

The AMT requires the recalculation of a taxpayer's income under a different set of rules. *See* 26 U.S.C. § 55. A tax is imposed at a graduated rate on the taxpayer's "alternative minimum taxable income"; if the amount of AMT is greater than the income tax calculated under the ordinary provisions, then the taxpayer must pay both the normal tax and the amount by which his AMT liability exceeds his ordinary tax liability. *See United States v. Hill*, 506 U.S. 546, 551 n.3 (1993) (discussing the AMT). Individuals are required to declare and pay AMT on their tax returns by stating their liability for the tax on Line 52 of their Form 1040 and attaching to their Form 1040 a prepared Form 6251.

We first find that the trial proofs did not constructively amend the indictment, because they did not "so modify essential elements of the offense charged," *Hathaway*, 798 F.2d at 910, that there is a "substantial likelihood" that defendant may have been convicted of an offense other than tax evasion. Contrary to defendant's assertion, he was not charged simply with evading taxes. Rather, the plain terms of the indictment demonstrate that the affirmative act defendant was charged with taking was evading taxes by "preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent 1985 U.S. Individual Tax Return, Form 1040." The Form 1040 required that he indicate his AMT liability and include a AMT Computation Form. He did neither. Thus, as generally charged in the indictment, defendant filed a false tax return because he omitted information required on the Form 1040 and thereby evaded paying taxes, specifically the AMT.

Having concluded that the indictment was not constructively amended, however, we must still consider whether the government's actions amounted to a "fatal" variance. We find that defendant has not shown that a

variance even occurred or, if one did occur, that his substantial rights were affected. First, the government's proof at trial was not "materially" different from the facts alleged in the indictment. *See Beeler*, 587 F.2d at 342. The indictment stated in general terms that defendant knew that he had "taxable income for the said calendar year . . . substantially in excess [of what he stated], and upon said additional income a substantial additional tax was due and owing." The government showed that defendant had underreported income. Defendant asserts that the underreporting of income, however, did not cause any tax deficiency since he still had no regular tax liability even with the correct income amount. But the underreported income did cause an AMT deficiency, because the AMT computation is based on adjusted gross income. *See* 26 U.S.C. § 55(b)(2). Moreover, § 55 of the Internal Revenue Code requires the payment of AMT, a certain kind of tax, if applicable. *See* 29 U.S.C. § 55. Defendant counters that "substantial additional tax" must have meant regular tax, as opposed to AMT. We find that the indictment was not so specific. Thus, given the generality of the facts alleged in the indictment, we cannot say that the government's evidence at trial was materially different.

But even assuming arguendo that a variance did occur, defendant has not demonstrated that the variance took him by surprise or placed him at risk of double jeopardy. See *Hart*, 70 F.3d at 860. At trial, defendant did not object to testimony regarding his AMT liability nor did he claim surprise. Indeed, defendant's expert witness testified at trial that he believed that defendant owed an AMT, although an amount less than the government claimed. Moreover, defendant was aware of the AMT obligation, as demonstrated by the fact that he prepared and attached a Form 6251 to his 1982 return.

In sum, we conclude that even if a variance occurred, it did not prejudice defendant so as to be deemed fatal, and it did not rise to the level of a constructive amendment.

Reversal of defendant's conviction under Count Five is not warranted on this ground.

C. Errors in Jury Instructions

Defendant asserts a number of errors with regard to the District Court's jury instructions which he claims merit reversal of the relevant counts. Initially, the government asserts that defendant waived any claims of error because he stipulated to the jury instructions to which he now objects. Moreover, as defendant concedes, he did not object contemporaneously to the instructions. In support of its position, the government relies on *United States v. Sharpe*, 996 F.2d 125 (6th Cir. 1993), in which the defendant challenged the jury instructions as a whole. This Court stated:

> [Defendant] did not object to these jury instructions in the district court. In fact, the instructions that the jury received were jointly submitted by the government and the appellant. "[N]ot even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge." *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

Id. at 128-29. In *Sharpe*, we also explained the doctrine of "invited error" which holds that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to make. *Id.* at 129. This doctrine is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences by having the verdict vacated. *See Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 61 (6th Cir. 1991). We have suggested that the doctrine applies to jury instructions requested by a party who later complains on appeal. *Sharpe*, 996 F.2d at 129 (citing *United States v. Baytank, Inc.*, 934 F.2d 599, 606-07 (5th Cir. 1991)).

Invited error, however, does not foreclose relief when the interests of justice demand otherwise. *See Fryman v.*

Federal Crop Ins. Corp., 936 F.2d 244, 251 (6th Cir. 1991). Whether the circumstances of a particular case justify deviation from the normal rule of waiver under this doctrine is left largely to the discretion of the appellate court. *Id.* We conclude that the doctrine of invited error does not foreclose our review in this case. Most importantly, assuming that error occurred, the government was at much at fault for inviting the error as the defendant since the parties stipulated to the same instructions. *See Fryman*, 936 F.2d at 251. In addition, this case can be distinguished from *Sharpe* in that the defendant in that case was simply challenging the jury instructions as faulty, *see* 996 F.2d at 128, while the defendant here is claiming that his constitutional rights have been violated because the District Court instructed the jury that the government had proven certain elements of the offenses. Thus, this is a case where the interests of justice would best be served if we consider defendant's assignments of error, even if we find they have no merit. This does not mean, however, that the fact that the parties stipulated to the instructions will not play a role in our analysis of some of defendant's claims.

Although we find that defendant did not waive his right to review under the invited error doctrine, we must still determine what standard of review to apply. "As a general rule, we will not consider issues not presented to and considered by the district court." *United States v. Harris*, 9 F.3d 493, 499 (6th Cir. 1993). Nevertheless, Rule 52(b) of the Federal Rules of Criminal Procedure provides us with authority to correct plain errors that were not raised before the District Court[3]. Defendant agrees that plain error analysis applies.

The Supreme Court has explained the appropriate analysis for plain error review in *United States v. Olano*,

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[3]FED. R. CRIM. P. 52(b) provides: "(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

507 U.S. 725 (1993). This Circuit discussed *Olano* in *United States v. Thomas*, 11 F.3d 620 (6th Cir. 1993), and we explained that our inquiry under Rule 52(b) is four-fold:

> First, we are to consider whether an error occurred in the district court. Absent any error, our inquiry is at an end. However, if an error occurred, we then consider if the error was plain. If it is, then we proceed to inquire whether the plain error affects substantial rights. Finally, even if all three factors exist, we must then consider whether to exercise our discretionary power under Rule 52(b), or in other words, we must decide whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings.

11 F.3d at 630. The Supreme Court's recent decision in *Johnson v. United States*, 117 S. Ct. 1544 (1997), confirmed that the four-factor test for plain error that we explained in *Thomas* applies when a judge fails to submit a materiality element of a crime to the jury.

Here, we will treat the stipulated instructions the same as we would treat unobjected-to instructions, by applying the plain error analysis as explained in *Olano*, *Thomas*, and *Johnson*.

We must find each of these four factors to be present before we can exercise discretion to correct an error. *See Johnson*, 117 S. Ct. at 1550.

1. Failure to Include "Materiality" as Element of § 1014 Offense

Defendant was convicted of violating 18 U.S.C. § 1014, which criminalizes "knowingly mak[ing] any false statement or report . . . for the purpose of influencing in any way the action" of an FDIC-insured bank "upon any application, advance, . . . commitment, or loan." 18 U.S.C. § 1014. Defendant asserts that materiality is an element of this offense and that the District Court erred

when it failed to instruct the jury on that element. The government counters that materiality is not an element of § 1014, so failure to instruct did not violate defendant's rights. The Supreme Court recently resolved this issue in *United States v. Wells*, 117 S. Ct. 921, 926-31 (1997), holding that materiality of falsehood is not an element under § 1014. Accordingly, this claim of error has no merit.

2. Instruction that Bank Was Federally Insured

Both Counts One and Two required proof that the bank, Great Lakes Federal Savings, was federally insured at the time of the offenses. To establish this element, the government presented testimony of the bank officer who authorized the loan as well as a certificate from the Office of Thrift Supervision verifying the bank's federally insured status.

On Count One, the District Court instructed, *inter alia*:

> The fourth element which the Government must prove beyond a reasonable doubt is that the false statement was made in connection with a loan application to a bank the deposits of which were then insured by the Federal Savings and Loan Association. *That element is not an issue in this case, and so the Court instructs you that the deposits of Great Lakes Federal Savings wee [sic] then insured by the Federal Savings and Loan Association.*

(emphasis added). The court gave a similar instruction with regard to Count Two, again instructing that the bank's deposits were federally insured at the time of the offense. The parties stipulated to this instruction for both counts. Defendant did not object to the instruction at trial, but now contends that both counts must be reversed because the instruction amounted to a directed verdict on a relevant element of the offenses.

This issue is similar to that faced in *United States v. Jones*, 65 F.3d 520 (6th Cir.), *vacated and reh'g granted*.

73 F.3d 616 (6th Cir. 1995), *aff'd en banc*, 108 F.3d 668 (1997). The defendant in *Jones* was charged with possession of a firearm after a prior conviction of a felony. He stipulated that he was a convicted felon. The defendant argued that the District Court had improperly removed the stipulated element from the jury's consideration. In its opinion, this Court declined to decide whether the challenged instruction was error. Rather, we assumed arguendo that it was error, and proceeded to apply plain error analysis. 108 F.3d at 671. The Court ultimately affirmed the conviction.[4]

As in *Jones*, we assume here that the instruction was error. However, we do not find reversal warranted. First, in light the circuit split regarding the effect of a stipulated instruction regarding an element of an offense and the lack of definitive precedent in this Circuit, the error was not "plain." "At minimum, the Court of Appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Olano*, 507 U.S. 734. *Jones* has not clarified whether such an instruction is indeed error.

Assuming the error was plain, however, it did not affect defendant's substantial rights. The element was not seriously contested at trial and the error could not have affected the outcome. This case is similar to *United States v. Prujansky*, 415 F.2d 1045 (6th Cir. 1969), which involved an instruction that failed to include an element of an offense which required the government to prove that the goods were stolen from the place named in the indictment. The court refused to find plain error, stating that " '[t]he verdict should not be reversed on account of a defect so

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[4]The situation in this case and in *Jones* is distinguishable from the one in *United States v. Sharpe*, 996 F.2d 125 (6th Cir. 1993), upon which the government relies for its "invited error" argument. Although all involve stipulated instructions, the District Court in *Sharpe* had not instructed the jury that a particular element of the offense had been established by the government. *See id.* at 128-29. Thus, the defendant in *Sharpe* was not claiming that the District Court had directed a verdict on an element of the offense.

obviously technical.' " *Id.* at 1048 (quoting *Grandi v. United States*, 262 F. 123, 124 (6th Cir. 1920)). The element of the offense at issue here is "obviously technical." Indeed, at trial, defendant did not dispute that the bank's deposits were federally insured. Thus, we find that the instruction did not affect substantial rights of defendant.

Moreover, even if we were to assume that there was plain error that affected substantial rights of defendant, we would decline to exercise our discretionary power under Rule 52(b). *See Thomas*, 11 F.3d at 630. The Supreme Court recently reiterated that "[w]hen the first the first three parts of Olano are satisfied, an appellate court must then determine whether the forfeited error '"seriously affect[s] the fairness integrity or public reputation of judicial proceedings"' before it may excercise discretion to correct the error." *Johnson*, 117 S. Ct. at 1550 (alteration in original) (quoting *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). Here, there is no dispute, and there was none at trial, that the bank's deposits were federally insured. There is no possibility that this alleged error seriously affected the fairness or public reputation of the judicial proceedings. In sum, we find that no miscarriage of justice will result from our decision.

Finally, we note that this case can be distinguished from *Jones*. In *Jones*, the district court instructed the jury: "[Y]ou *will find* that the government has established this element of the offense." As Judge Ryan suggested in his concurrence to the original panel's decision, the constitutional error with the instruction was in telling the jury what it "will find" as opposed to telling the jury that the stipulated fact was "proved." Here, the District Court simply instructed the jury that the bank's deposits were federally insured. This reading would suggest that the instruction was not an error at all. However, since this approach can be criticized as mere semantics, we prefer to base our decision on our finding that the error was not plain and did not affect defendant's rights.

3. Instruction that False Statements of Gross Income on Tax Returns Were Material as a Matter of Law

Counts Six, Ten, and Twelve through Fifteen charged defendant with filing materially false income tax returns, in violation of 26 U.S.C. § 7206(1). The District Court instructed, *inter alia*:

> The question of the materiality of the allegedly false statements made in connection with the subscribing or signing of a tax return is a question of law for the Court.
>
> The Court instructs you that if you find that the defendant understated the gross income reported in his individual return, then the Court instructs you that the understatement of the gross income is a material matter as contemplated by Section 7206(1). Further, if you find that the defendant overstated gross income on the amended corporate returns, then the Court instructs you that the overstatement of gross income is a material matter as contemplated by Section 7206(1).

Defendant stipulated to this instruction and did not object at trial. On appeal he argues that his convictions on these counts must be reversed because the instruction removed the issue of materiality from jury consideration.

We apply the four factor test for plain error established in *Olano*. For the purposes of our analysis in this case, we assume that defendant satisfies the first three elements of the test and rest our decision on the fourth prong. Under this prong, reversal is only appropriate if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 117 S. Ct. at 1550 (alteration in original) (quoting *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). We find that reversal is not appropriate in this case.

Criminal liability under 26 U.S.C. § 7206(1) attaches to any person who "[w]illfully makes and subscribes any

return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." *Id.* Under this section, false statements are material if they make it more difficult for the IRS to verify defendant's tax returns. *United States v. Fawaz*, 881 F.2d 259, 263-64 (6th Cir. 1989). In this case, the evidence established that defendant understated by significant and substantial sums the gross income stated in the individual returns he filed in 1985, 1987, and 1988. In an attempt to conceal these false statements, he then overstated by significant and substantial sums the gross income reported in the amended corporate returns. These false statements caused a substantial tax deficiency and were clearly large enough to interfere with the IRS in its effort to police and verify tax returns. The whole of the evidence on appeal established the unquestionable materiality of defendants misstatements. In these circumstances, it is impossible to conclude that the instructions at trial affected "the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 117 S. Ct. at 1550.

D. Ineffective Assistance of Counsel

Defendant contends that he was denied effective assistance of counsel, primarily because counsel failed to discuss certain exhibits at trial which would have corroborated his testimony that certain income was corporate and not personal. Defendant concedes that this issue was not raised before the District Court and, therefore, asks us to remand for development of a record and an initial determination.

Ineffective assistance of counsel claims are not ordinarily cognizable on direct appeal. *See United States v. Seymour*, 38 F.3d 261, 262 (6th Cir. 1994). The exception to this rule occurs when the record is adequate to address the claim. *See United States v. Wunder*, 919 F.2d 34, 37 (6th Cir. 1990) (per curiam). Defendant's request for a remand suggests that he does not believe the record is currently

adequate. We agree. "The more preferable route for raising an ineffective assistance of counsel claim is in a post-conviction proceeding under 28 U.S.C. § 2255," whereby the parties can develop an adequate record. *United States v. Carr*, 5 F.3d 986, 993 (6th Cir. 1993). Accordingly, we decline to remand.

E. Credibility or Adequacy of Evidence

Pro se, defendant contends that evidence presented at the sentencing hearing establishes that the evidence presented at trial was faulty as to certain aspects of the computation of tax due and owing and the interpretation of the books and records of his accounting firm. Presumably, defendant believes that a new trial should be ordered.

This matter is not properly before us on this appeal. Defendant has raised these issues in a separate appeal, seeking a new trial on the grounds of newly discovered evidence. We have affirmed the District Court's denial of a new trial. We will not reconsider the issue here.

F. Prosecutorial Misconduct

Pro se, defendant contends that the trial was infected by prosecutorial misconduct. Defendant bases his claim on "newly discovered" evidence which he alleges demonstrates that the prosecution lied. Again, these arguments were considered and rejected in defendant's appeal of the District Court's denial of his motion for a new trial on the grounds of newly discovered evidence. We will not reconsider this claim here.

Defendant also asserts that the prosecutor committed misconduct when he asked defendant in front of the jury, "Do you know what an oath is? Do you know the penalty for lying?" The prosecution also asked defendant whether he knew that he could be prosecuted for perjury. We find that the prosecutor's actions did not constitute misconduct. This court has held that merely advising a witness of the consequences of perjury does not violate due process. *See United States v. Pierce*, 62 F.3d 818, 832 (6th Cir. 1995).

If such communication results in silencing a witness, then the court may conclude that a violation occurred. *Id.* We find that the prosecutor's statements did not intimidate defendant into refusing to testify, and we conclude that such communication did not constitute misconduct in this case.

G. Juror Misconduct

Pro se, defendant asserts that he did not receive a fair trial because the jury foreman was the son of a car salesman with whom defendant allegedly has an acrimonious business relationship. From defendant's pro se brief we gather that defendant raised this issue before the District Court in a motion for a new trial. This case involves an appeal from the District Court's judgment of conviction and sentence. There is no appeal before us from the denial of that motion.

H. Evidence Regarding State Tax Returns

In order to prove criminal intent, the government introduced evidence pursuant to FED. R. EVID. 404(b) that defendant had not filed his state income tax returns for a number of years.[5] This evidence consisted mainly of a certificate of non-filing from the State of Michigan Department of Treasury. The government referred to this evidence a number of times during the course of the trial. After the trial, but before sentencing, the State of Michigan informed the government that defendant actually did file his

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[5]Rule 404(b) provides in pertinent part:

> (B) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

FED. R. EVID. 404(b).

state tax returns for some of those years. In his reply brief only, defendant argues that the introduction of this false evidence during trial mandates reversal.

This issue is not properly before us on this appeal. In a separate appeal, defendant has already sought a new trial on the grounds of this newly discovered evidence. We rejected defendant's claim in that appeal, and we will not reconsider the issue here.

III. Conclusion

For the foregoing reasons, we reject defendant's assignments of error.

APPENDIX B

No. 96-1687
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY JOE BARROW,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Plaintiff-Appellee.

BEFORE: KENNEDY, BOGGS, and WOOD, Circuit Judges.

On Appeal from the United United States District Court for the Eastern District of Michigan

KENNEDY, Circuit Judge. Defendant pro se appeals the District Court's denial of his motion for a new trial on the grounds of newly discovered evidence. For the following reasons, we AFFIRM.

On September 28, 1994, a jury convicted defendant of one count of making false statements in connection with a bank loan application, in violation of 18 U.S.C. § 1014 (Count One); one count of bank fraud, in violation of 18 U.S.C. § 1344 (Count Two), three counts of income tax evasion, in violation of 26 U.S.C. § 7201 (Counts Five, Nine, and Eleven); and six counts of making or subscribing false tax returns or false amended tax returns, 1 in violation of 26 U.S.C. § 7206 (Counts, Six, Ten, and Twelve through

*The Honorable Harlington wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

1Defendant was charged with filing a false Individual Income

Tax Return, Form 1040, in 1984 through 1988, and was charged with filing a false Corporate Income Tax Return, Form 1120X, in

(First Amendment), 1988 (Second Amendment), and 1989 (Amendment). On October 18, 1994, defendant replaced his trial counsel with new counsel to handle post-trial motions and appeals. A direct appeal of defendant's conviction is pending before this Court.

After holding a sentencing hearing, the District Court sentenced defendant on June 5, 1995, to imprisonment for concurrent terms of 21 months, a fine of $11,000.00, restitution to Great Lakes Bancorp in the amount of $39,000.00, restitution to the Internal Revenue Service in the amount of $42,195.71, and a special assessment of $550.00. On February 9, 1996, defendant filed a pro se Motion for Certification for a New Trial Based Upon Newly Discovered Evidence. The District Court denied the motion on May 9, 1996. This timely appeal followed.

A.

FED. RULE CRIM. P. 33 provides that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." At the time defendant filed his motion, a direct appeal of his conviction was pending. Hence, the District Court did not have power to grant the motion absent a remand. See FED. R. CRIM. P. 33. Defendant therefore properly moved the District Court pursuant to the procedure delineated in United States v. Blanton, 697 F.2d 146, 147-48 (6th Cir. 1983) (per curiam). Blanton holds that a district court can certify to the appellate court that it is inclined to grant a motion for a new trial so that the appellate court can consider

a remand to the district court. See ids (citing United States v. Phillips, 558 F.2d 363 (6th Cir. 1977)). Here, the District Court was satisfied that it would not grant the motion for new trial in any event, so he denied the motion outright. In such a situation, an immediate appeal may be taken and consolidated with the pending appeal. See id. at 148. Accordingly, we have jurisdiction to review. See id.

B.

"Motions for a new trial based on newly discovered evidence are disfavored, and a trial court's determination that a new trial is not warranted will not be reversed absent 'clear abuse of discretion.' " United States v. O'Dell, 805 F.2d 637, 640 (6th Cir. 1986) (quoting United States v. Allen, 748 F.2d 334, 337 (6th Cir. 1984) (per curiam)). The defendant bears the burden of showing that a new trial ought to be granted. United States v. Seago, 930 F.2d 482, 488 (6th Cir. 1991). Specifically, for the discovery of new evidence to warrant a new trial, a defendant must show the following: (1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce acquittal. See id. We must bear in mind that newly discovered evidence does not include new legal theories. See Seago, 930 F.2d at 490. "A claim [belatedly pursued is not newly discovered.' " Id (quoting United States v. Molovinsky, 688 F.2d 243, 248 (4th Cir 1982)).

Defendant first contends that the District Court erred in not granting a new trial on Counts Five and Six on the grounds of newly discovered evidence that the 1985 tax deficiency was computed contrary to tax law and Internal Revenue Service (IRS) publications. At trial, defendant argued that even if he had underreported income, he still would have had no tax liability. The government, however, established a tax deficiency through the Alternative Minimum Tax (AMT), 26 U.S.C. § 55. At the sentencing

hearing, defendant presented the testimony of Neil Nusholtz, a tax lawyer who had not testified at trial and who defendant hired after trial. Nusholtz disputed the government's AMT calculation, claiming that it was contrary to IRS rules. He testified that his calculation was proper and resulted in no tax liability. [2]

Defendant has not established that a new trial is warranted on the basis of this evidence. Nusholtz's calculation and the IRS publications are not "newly discovered evidence." Rather, defendant is attempting to relitigate his case under a new theory by hiring a new lawyer and a new expert to reinterpret the legal significance

Specifically, Nusholtz testified that a deduction from a limited business partnership called "Hambrose Leasing" was a business deduction that should have been excluded from the AMT calculation. Defendant allegedly had put the deduction on his Form 1040 on the wrong schedule, which had caused it to be included in the AMT calculation. Nusholtz also presented IRS materials which he claimed showed that the deduction should have been excluded from the AMT calculation. If this deduction had been excluded, defendant's tax liability would have been zero.

of evidence that was either presented or available at trial, namely defendant's 1985 tax return. Rule 33 and the first prong of the Seago test require that the evidence, not merely the legal implications of the evidence, be newly discovered. See Seago, 930 F.2d at 488, 489. Moreover, he has not shown that the evidence could not have been discovered earlier with due diligence. We see no reason why defendant's trial team, which included two tax experts, could not have found the same IRS publications or have made the same calculations at the time of trial. Indeed, defendant's new tax expert testified at the sentencing hearing that the alleged errors in the AMT calculation "were right there. You could see them right away." Finally, the District Court considered

and rejected Nusholtz's testimony when determining defendant's sentence. It is therefore unlikely that the evidence would result in an acquittal. Because defendant has failed to satisfy the Seago test, we conclude that the District Court did not abuse its discretion in denying defendant a new trial on the basis of this evidence.

2. Defendant next asserts that he deserves a new trial on Counts Nine through Twelve, because he has discovered exculpatory evidence in the records of defendant's accounting firm, Barrow, Aldridge & Co. Defendant's tax evasion and false tax return convictions for 1987 and 1988 were based in part on unreported income that the defendant received from New Center Hospital (Hospital) and Central City Health Services (Central City) .3 Defendant was also convicted of filing false amended corporate tax returns for his accounting firm. In the firm's returns, defendant reported income from the Hospital which the government proved was income he should have personally reported.

At trial, defendant claimed that this income actually constituted loan repayments from the firm. In other words, defendant asserted that the Hospital and Central City paid the firm for his services and the firm used this income to repay defendant for loans he had made to the firm. Defendant claimed that these transactions were evident in the firm's books. The government's witness testified that he could not find any entries in the firm's books which supported defendant's claim.

At the sentencing hearing, defendant's new expert witness, Nusholtz, identified certain balances in the firm's general ledger which he testified were adjustments to the loan account, tlberek~ supporting defendant's claim. This ledger

had been presented at trial as Government Exhibit 526. The government's witness had testified at that time that there was a mathematical difference

In 1982, defendant was elected to the Board of Directors of Detroit Central Hospital, and in 1986 he became chairman. During this time, the hospital was renamed New Center Hospital and ownership was transferred to a holding company, Central City Health Services. By 1986, defendant's accounting firm had become the accounting department for the hospital and the holding company. By 1987, defendant's data processing company, Complete Information Services (CIS), of which defendant was the sole proprietor, was performing computerized billing services for the hospital and related entities. Around this time, defendant became chief executive officer of both the Hospital and Central City.

between certain entries in the ledger, but no indication of the reason for the discrepancy.

At first glance, it is hard to see how this evidence can be "newly discovered" or how it could not have been discovered earlier with due diligence. The facts supporting defendant's claim were within his knowledge at the time of trial. Indeed, the accounting firm's general ledger and records were submitted as evidence, and, when he testified, defendant could have pointed out the relevant entries. To support his contention that this evidence is "newly discovered," however, defendant maintains that the government "denied the defendant, a certified public accountant, supervised personal access to his accounting firm's books and records and tax return preparation workpapers so that he could obtain the necessary documents to disprove the [government's] claim." Brief for Defendant-Appellant at 16. Defendant claims that his attorney requested twice that defendant have personal access to his

"records." Defendant admits that one of his tax experts was permitted to see the "records." In his brief, defendant does not explain specifically what "records" he was not permitted to see, but in one of his briefs to the District Court in support of his motion for a new trial, he "admits without hesitation that he had the general ledger" at the time of trial. Consequently, defendant cannot claim that the general ledger, or any evidence contained within it, is "newly discovered" evidence. See Seago, 930 F.2d at 488.

Realizing this, defendant tries to focus his argument on the fact that he was denied personal access to his tax return workpapers, which he says are necessary for understanding the ledger entries. He concedes, however, that his tax expert was permitted access to the tax return workpapers. But he nevertheless maintains that this expert, a former IRS agent, was unfamiliar with the workpapers and records and, therefore, was unable to locate the alleged loan entry. If he had had access to the papers, defendant argues, he could have identified the relevant entries.

We still fail to see how this evidence is "newly discovered" or how it could not have been discovered earlier with due diligence. The first prong of the Seago test requires that the evidence be unknown to the defendant at the time of trial. See Seago, 930 F.2d at 488. Either defendant or his trial team had access to all of the documents which defendant claims establish that the loan transaction occurred. Moreover, he admits that he told his counsel while preparing for trial that the entries were in the books. Therefore, defendant had within his knowledge all of the facts and materials necessary to make this argument at trial. Indeed, in an affidavit filed in support of defendant's motion for a new trial, defendant's expert trial witness, a certified public accountant, states that while preparing for trial and doing the tax calculations, he "understood" that such entries had been made in the books, but that he was never asked by defense counsel during trial about these entries. Additionally, during his own testimony, defendant could have explained his analysis of the books by using

the exhibits; his brief in fact suggests that it would not have taken him long to find the alleged key entries. We do not know why defense counsel chose not to pursue this defense theory, but it is not our role here to question that decision. If anything, defendant has shown only a failure of due diligence in finding the alleged entries in the books before or during trial. Defendant has not demonstrated that the Seago test is satisfied with regard to this evidence.

Defendant also argues that a new trial is necessary on his tax evasion convictions because his tax expert at trial, James Tassoni, has recanted his testimony. Tassoni, a certified public account, was a defense witness. Nevertheless, he testified at trial that he believed defendant did owe an AMT, although an amount lower than the government's calculations. In an affidavit submitted with defendant's motion for a new trial, Tassoni recanted his testimony and stated that he would now testify that (1) defendant had no tax liability for 1985 and (2) defendant had no tax liability for 1986 and, in fact, an overassessment was made. Tassoni's statement essentially serves to corroborate Nusholtz's testimony regarding the proper AMT calculation.

An affidavit by a recanting witness, when offered in support of a motion for a new trial, is viewed with extreme suspicion. See United States v. Chambers, 944 F.2d 1253, 1264 (6th Cir. 1991).

"In considering a motion for new trial based on the contention that an affidavit by a recanting witness
constitutes newly discovered evidence the first test to be applied by the judge is whether the court is reasonably well satisfied that the prior testimony was false. Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949). If that first and primary ground is not satisfied, the primary ground for granting the new trial is lacking." Id. (quoting United States v. Kearney, 682 F.2d 214, 220 (D.C. Cir. 1982)). The defendant must then satisfy the four-pronged Seago

test.

The District Court did not explicitly consider whether it believed the prior testimony was false. The court instead focused on the fact that the recanting witness was not a government witness. The court noted that a defendant rarely would have reason to ask for a new trial based on the false testimony of a defense witness, because one would assume that the witness would testify favorably. Here, defendant's recanting witness is more aptly viewed as offering more favorable evidence than he did at trial. The District Court thus found that defendant had not established the second prong of the Seago test because a defendant fails to exercise due diligence when his own witness does not testify as effectively as he perhaps could have. Furthermore, the court found that the recanted testimony was actually another version of Nusholtz's testimony and thus failed to constitute "new evidence" for the same reasons discussed with regard to that testimony. We find that the District Court did not abuse its discretion in denying defendant's motion for a new trial on these grounds.

Defendant next argues that a new trial is appropriate because of newly discovered evidence that he did in fact file some of his state income tax returns. In order to prove criminal intent, the government introduced evidence pursuant to FED. R. EVID. 404 (b)4 that defendant had failed to file state income tax returns for the years 1985 through 1992. This evidence consisted mainly of a certificate of non-filing from the State of Michigan Department of Treasury. The government's attorneys made a number of references to this evidence during the course of the trial.

After trial, the government again contacted the State of Michigan to verify certain information while preparing to respond to one of defendant's motions, and at that point learned that the State had erroneously certified the defendant's failure to file for some of the years. Defendant

had in fact filed state income tax returns for 1985, 1986, 1987, and 1988. However, the State stated that it was still unable to locate filed returns for 1984, 1989, 199o, 1991, and 1992. The government thus concedes that defendant did file his state income tax returns for some of the years in question.

First, we find that this evidence is not "newly discovered" evidence. Defendant admits that he knew at trial, and in fact testified at trial, that he had filed his state income tax returns.

4To the extent that defendant's brief can be construed as arguing that this evidence should not have been admitted because of its prejudicial nature, we conclude that defendant cannot raise that issue here in a motion for a new trial brought more than seven days after judgment. See FED. R. CRIM. P. 33.

Moreover, the fact that the State erred in its original certification and that defendant, knowing that he had filed his returns, did not pursue the matter with the State, shows a lack of diligence, not a surprise discovery. Finally, defendant has not shown that this evidence would likely produce acquittal. Even with the correction from the State, the evidence still demonstrates that defendant failed to file state income tax returns for 1984 and 1989 through 1992. In addition, the evidence of defendant's failure to file state income tax returns was only a portion of the evidence that the government introduced regarding the other acts by defendant indicating criminal intent. Because defendant has failed to establish three of the Seago factors with regard to this evidence, we conclude that the District Court did not abuse its discretion in denying a new trial on this ground.

5. Defendant argues next that the District Court should have granted him a new trial on the grounds of newly discovered evidence regarding the calculation of the tax deficiencies for the 1985 and 1987 tax evasion counts. Defendant claims that the government should not have relied on the amount shown as tax due by the defendant on his return, but rather should have prepared a new return that corrected clerical errors and then should have used that amount to determine the deficiency. This new evidence is again based on the testimony of defendant's new expert, Nusholtz, at the sentencing hearing.

Regardless of whether the IRS is in fact required to prepare a new tax return, we find that defendant is simply trying to relitigate his case under a new theory. His new expert is reinterpreting evidence presented and available at trial. This alleged IRS requirement could have been presented at trial, and the failure to do so can only be attributed to a lack of due diligence. Having failed to establish the first two Seago requirements with regard to this evidence, we conclude that the District Court did not abuse its discretion in denying a new trial on this basis.

6. Defendant maintains that the court should grant a new trial because of newly discovered evidence that his trial counsel denied him effective assistance in violation of the Sixth Amendment. There are two parts to defendant's claim. First, defendant asserts that he was denied representation free from conflicts of interest. Second, defendant describes numerous other instances whereby he was denied effective assistance of counsel. We find that neither provides grounds for granting defendant a new trial.

We have held that "evidence of ineffective assistance of counsel is not newly discovered evidence for purposes of a motion for new trial where the facts supporting the claim were within the defendants knowledge at the time of trial." Seago, 930 F.2d at 489. In Seago, 930 F.2d at 489, we agreed with the Seventh Circuit's holding and rationale in United States v. Ellison, 557 F.2d 128 (7th Cir. 1977). The defendant in Ellison alleged that counsel had made tactical errors in the course of his trial, such No. 96-1687 14 as refusing to challenge allegedly inaccurate statements made at trial. See Ellison, 557 F.2d at 131. The court held that since the underlying facts of defendant's ineffective assistance of counsel claim were known to defendant at the time of trial, they did not constitute "newly discovered evidence" for purposes of FED. R . CRIM. P . 33. See id. at 133.

Putting aside for now the conflict of interest claim, we find that Seago's holding controls the numerous other alleged instances of ineffective counsel. We also note that the record shows that the District Court has already ruled that defendant did not receive ineffective assistance of trial counsel.5 Nevertheless, defendant argues that all but one of the facts alleged in this appeal were not raised in the earlier motion for a new trial because he was not aware of them at the time. Therefore, he contends that this evidence is "newly discovered." Defendant primarily complains, however, that trial counsel failed to discover "evidence" that we have decided is not "newly discovered" or is more aptly viewed as new interpretations of evidence presented at trial. Tactical errors committed in the course of trial, such as the failure to pursue a particular defense, are facts that were within defendant's knowledge at the time of trial. See Seago, 930 F.2d at 489. The District Court did not abuse its discretion in denying a new trial on this basis.

On February 8, 1995, the District Court entered an order denying defendant's motion for a new trial in which he found no merit to defendant's ineffective assistance of counsel claim.

Defendant also asserts that a conflict of interest resulted in ineffective assistance of counsel. He states that after trial, defendant overheard a conversation between his defense counsel and his defense expert, Morris Culver, in which counsel indicated that he had represented IRS Special Agent James Dowling in legal matters with the IRS. Dowling was the IRS case agent in the investigation and prosecution of defendant. Defendant states further that his appellate counsel asked trial counsel about this matter, and that trial counsel confirmed that he had in fact represented Dowling in legal matters before the IRS. Finally, defendant maintains that he was never told of this representation and never gave permission for dual representation.

The Supreme Court has established a two-part test for analyzing ineffective assistance claims based on a conflict of interest. See Strickland v. Washington, 466 U.S. 668, 692 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1g80)); Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987). In such circumstances, a defendant must first demonstrate that his attorney had an actual conflict of interest. Thomas, 818 F.2d at 480. In other words, the defendant must show that his attorney "actively represented conflicting interests." Strickland, 466 U.S. at 692. A defendant must next establish that this conflict of interest adversely affected his attorney's performance in representing him. Id. at 692; Thomas, 818 F.2d at 480. Thus, this test directs a reviewing court to presume prejudice if the defendant shows that *his* counsel's deficient performance was the result of an actual conflict of interest. See Strickland, 466 U.S. at 692; Thomas, 818 F.2d at 480.

Although we will accept that this evidence is "newly discovered," we find that defendant has failed to establish that his Sixth Amendment right to the effective assistance of counsel has been violated, because he has not demonstrated that an actual conflict of interest existed at the time of trial. Defendant's trial counsel has submitted an affidavit declaring that he has "never represented Mr. Dowling as an attorney or in any other capacity, nor have I ever been retained by him for legal advice or consultation." Moreover, even if counsel at some point has represented Dowling, defendant has made no effort to demonstrate that this representation adversely affected his attorney's performance in representing him. Thus, defendant has failed to demonstrate that he was denied the effective assistance of counsel on this ground and he is consequently not entitled to a new trial.

Finally, defendant makes a general statement that he is entitled to a new trial because of prosecutorial misconduct. He then refers us to his brief in support of his motion for a new trial to the District Court. The District Court did not address this issue, perhaps because defendant's claims are intertwined with his claims regarding the newly discovered evidence. Essentially, defendant contends that this new evidence proves that the government's attorneys and witnesses lied at trial and at the sentencing hearing. This "evidence" of prosecutorial misconduct is not "new" evidence for the same reasons that most of the evidence discussed above is not new evidence. Moreover, such conclusory allegations of misconduct cannot be the basis for a new trial. Defendant's claims are simply quarrels with the government's theories, and he cannot now relitigate his defense with new arguments.

For the foregoing reasons, we AFFIRM.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TOMMY JOE BARROW,
Petitioner,

Case No. 98-CV-72879-DT
Case No. 93-CR-81042-01

vs.

HONORABLE GEORGE E. WOODS
HONORABLE STEVEN D. PEPE

UNITED STATES OF AMERICA,
Respondent.

REPORT AND RECOMMENDATION

Petitioner Tommy Joe Barrow was convicted on several counts of violating federal tax laws. Petitioner unsuccessfully challenged his convictions through post-trial motions, a direct appeal, and appeals from the denial of his post-trial motions. He then filed this motion under 28 U. S. C. § 2255 to vacate, set aside or correct his conviction. The government responded and Petitioner subsequently filed a reply brief. This matter was referred for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Because Petitioner raises claims that: (1) have already been addressed by the Sixth Circuit in previous appeals; (2) are procedurally defaulted; or (3) should be declined on the merits, his motion to vacate, set aside or correct his conviction should be denied.

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1. BACKGROUND

An extensive factual background of this case can be found in

several of this Court's earlier orders and the Sixth Circuit's decisions on review. A short summary will suffice here: Petitioner Barrow, a two-time mayoral candidate for the City of Detroit, was a certified public accountant in the Detroit area. He founded and controlled a local accounting firm, Barrow, Aldridge & Co. Petitioner also was the sole proprietor of a data processing company, Complete Information Services ("CIS"). In 1982, Petitioner was elected to the Board of Directors of Detroit Central Hospital (later re-named New Center Hospital), and in 1986 he became chairman. By this time, his accounting firm had become the accounting department for the hospital and its holding company, Central City Health Services. By 1987 CIS began performing computerized billing services for the hospital and its related entities. Petitioner became chief executive officer of both New Center and Central City around this time.

In October 1993, a grand jury returned a fifteen-count indictment against Petitioner Barrow. Following a ten-day trial before this Court, the jury acquitted Petitioner on Counts Three, Four, Seven and Eight but convicted him on all other counts, including: (1) making false statements in connection with a bank loan application, 18 U.S.C. § 1014 (Count One); (2) bank fraud, 18 U.S.C. § 1344 (Count Two); (3) income tax evasion, 26 U.S.C. § 7201 (Counts Five, Nine and Eleven); and (4) willfully filing false tax returns, 26 U.S.C. § 7206 (Counts Six, Ten, and Twelve through Fifteen). This Court sentenced

Petitioner to a total of twenty-one months of imprisonment.

Petitioner pursued multiple post-conviction challenges in this Court. These include: (1) post-trial motion for judgment of acquittal (denied January 26, 1995); (2) first motion for new trial (denied February 8, 1995); (3) post-conviction motion for mistrial or alternatively for evidentiary hearing (denied January 19, 1995); and (4) second motion for new trial (denied May 9,

1996).

Petitioner also sought review of several claims before the Sixth Circuit. He filed a direct appeal of his conviction asserting the following:

1. There was a substantial variance between the allegations of Count Five of the indictment and the government's trial proofs.

2. The District Court committed plain error in instructing the jury that the bank, Great Lakes Federal Savings, was federally insured at the time of the offenses described in Counts One and Two.

3. The District Court erred in failing to instruct the jury that the materiality of the alleged false statement was an element of the 18 U.S.C. § 1014 offense.

4. The District Court erred in instructing the jury that overreporting or underreporting income was material as a matter of law.

5. Defendant's trial counsel was ineffective for various reasons.

6. Evidence presented at trial was faulty as to certain aspects of the computation of tax due and owing and the interpretation of the books and records of defendant's accounting firm.

7. The District Court erred when it supplemented the record on appeal
pursuant to Fed. R. App. P. 10(e).

8. The trial was infected with prosecutorial misconduct.

9. Defendant did not receive a fair trial because the jury foreman was the son of a car salesman with whom defendant had an acrimonious businesses relationship.

10. The introduction of evidence under Fed. R. Evid. 404(b) purporting to show that defendant did not file several Michigan state income tax returns was false and thereby deprived defendant of a fair trial.

Petitioner also appealed this Court's denial of his second motion for new trial raising several issues including:

1. The District Court erred in not granting a new trial on Counts Five and Six on the grounds of newly discovered evidence that the 1985 tax deficiency was computed contrary to tax law and Internal Revenue Service publications.

2. The District Court erred in not granting a new trial on Counts Nine
through Twelve on the grounds of newly discovered exculpatory evidence found in the records of Barrow, Aldridge & Co.

3. The District Court erred in not granting a new trial on the grounds that defendant's tax expert at trial, Mr. James Tassoni, later recanted his testimony.

4. The District Court erred in not granting a new trial on the grounds of
newly discovered evidence that defendant did in fact file several of his Michigan state income tax returns.

5. The District Court erred in not granting a new trial on the grounds of
newly discovered evidence regarding the calculation of the tax deficiencies for the 1985 and 1987 tax evasion counts.

6. The District Court erred in not granting a new trial on the grounds of
newly discovered evidence that defendant's trial counsel denied him effective assistance in violation of the Sixth Amendment.

7. The District Court erred in not granting a new trial on the grounds of
prosecutorial misconduct.
The Sixth Circuit joined the two appeals for oral argument, but filed two separate decisions

affirming the convictions and this Court's orders. See United States v. Barrow, 118 F.3d 482 (6th Cir. 1997) (affirming convictions on direct appeal); and Barrow v. United States, 106 F.3d 400, 1997 WL 31427 (6th Cir. Jan. 27, 1997) (table) (affirming this Court's
denial of the second motion for new trial). Petitioner then filed this § 2255 motion, seeking review of the following issues:

I . Petitioner's convictions on Counts 5 and 6 for 1985 were obtained in violation of his Sixth Amendment right to effective assistance of counsel; his Fifth Amendment right to due process of law when the 1985 Alternative Minimum Tax deficiency for which Petitioner was convicted was computed in a manner proscribed by the income tax laws of the United States.
2. The government's introduction of false evidence pursuant to Fed. R. Evid. 404(b) denied Petitioner his right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and rendered his trial fundamentally unfair.

3. The district court committed error when permitted the introduction of
evidence under Rule 404(b) without making the required findings and when its instruction to the jury was deficient as to the

limited use of the government's introduction of evidence pursuant to Fed. R. Evid. 404(b). Such failure amounted to denial due process guaranteed by the Fifth Amendment to the United States Constitution and rendered Petitioner's trial fundamentally unfair.

4. Petitioner was denied due process of law as guaranteed by the Fifth
Amendment to the Constitution of the United States as a result of the government's failure to disclose exculpatory material and impeachment evidence related to Counts 5, 6 and 9-15 and thereby denied Petitioner a fair trial.

5. Petitioner's convictions on Counts 9 through 15 were obtained in
violation of his Fifth Amendment right to due process and his Sixth Amendment right to effective assistance of counsel.
6. Petitioner's convictions on Counts 9-15 were obtained in violation of

petitioner's Fifth Amendment right to due process where he was convicted of diverting corporate income when under the tax laws of the United States, a shareholder owner can have no diversion of corporate [earnings) where the company had negative earnings and profits (retained earnings) and loan and capital accounts which exceeded the amount of the income alleged to have been diverted.

7. Petitioner was denied the effective assistance of counsel at the guilt-
or-innocence phase of his trial in violation of his Fifth and Sixth Amendment rights as guaranteed by the Constitution of the United States.

8. Petitioner was denied effective assistance of appellate counsel as
guaranteed by the Sixth Amendment to the United States Constitution as a result of appellate counsel's failure to properly raise and argue meritorious issues.

9. Petitioner's convictions on Counts Six, Ten and Twelve through Fifteen were obtained in violation of petitioner's Fifth Amendment right to due process when the court instructed the jury that the false statements of gross income on tax returns were material as a matter of law.

II. ANALYSIS

A. Standard for Relief from Conviction and/or Sentence Under & 2255

A prisoner may seek relief from a conviction and/or sentence under 28 U.S.C. § 2255 if the prisoner can demonstrate that there are flaws in the conviction or sentence which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice. *Boyer v. United States*, 55 F.3d 296, 298 (7th Cir.), cent. denied, 516 U.S. 904 (1995); *United States v. Todaro*, 982 F.2d 1025, 1028 (6th Cir.), cell. denied, 508 U.S. 943 (1993).

B. Claims Already Addressed by the Sixth Circuit Several of the claims Petitioner Barrow raises in his § 2255 motion were raised in his previous direct appeal and on appeal of his motion for new trial. These include: (1) Petitioner's claims in Issue One[1]; (2)

[1]Barrow, 1997 WL 31427, at *2 (finding that: (1) Petitioner offered no "newly discovered evidence"; (2) Petitioner was simply trying to relitigate the issue; and (3) the evidence would not likely

Petitioner's claim in Issue Two involving his filing of Michigan state income tax returns[2]; and (3) all of Petitioner's claims in Issues Four[3],Five[4]

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result in an acquittal); *see also Barrow*, 118 F.3d at 494 (declining reconsideration of the issue). Note: the ineffective assistance of counsel claim raised here is the same as that set out in Petitioner's Issues Seven and Eight.

[2]In his Issue Two Petitioner complains of two different types of other acts evidence presented at trial: (1) a certificate from the State of Michigan that he failed to file state income tax returns for several years; and (2) the purportedly fraudulent 1993 federal income tax return he filed with his wife. The claim involving his state income tax returns has already been addressed by the Sixth Circuit. *See Barrow*, 1997 WL 31427, at *5 (finding that: (1) the evidence was not "newly discovered evidence"; (2) the state's error in its original certification was not a surprise discovery; and (3) the evidence would not likely result in an acquittal because the record still demonstrated that Petitioner failed to file state income tax returns for tax years 1984 and 1989 through 1992 and the certificate was only a portion of the other acts evidence presented at trial); *see also Barrow*, 118 F. 3d at **495** (declining reconsideration of the issue). His claim in Issue Two involving his 1993 federal income tax return is addressed infra in this Report.

[3]*Barrow*, 1997 WL 31427, at **2-3 (finding that the evidence was not "newly discovered" and that Petitioner had within his knowledge the relevant information at the time of trial); *see also Barrow*, 118 F.3d at 494 (declining reconsideration of issues involving credibility or adequacy of evidence).

[4]*Barrow*, 1997 WL 31427, at **2-3 (finding that the evidence was not "newly discovered" and that Petitioner had within his knowledge the relevant information at the time of trial); *see also Barrow*, 118 F.3d at 494 (declining reconsideration of issues involving credibility or adequacy of evidence). Although Petitioner Barrow indicates in the caption of Issue Five that he raises an ineffective

and Nine[5]. The government contends that this Court should decline to review those claims.

In considering a prisoner's motion to vacate under § 2255, a federal court retains the discretion to deny relief when an appellate court has already addressed on direct appeal the same issues and ruled against petitioner. *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969); *Stephan v. United States*, 496 F.2d 527, 528-29 (6th Cir. 1974), cert. denied, 423 U.S. 861 (1975). See also *Sanders v. United States*, 373 U.S. 1, 15 (1963) (stating criteria for giving controlling weight to a determination of an issue previously raised); *Murchu v. United States*, 926 F.2d 50, 55 (1st Cir. 1991); *United States v. Smith*, 843 F.2d 1148, 1149 (8th Cir. 1988). This discretion is also available when an appellate court reviews a district court's denial of a motion for new trial. See *Widgery v. United States*, 796 F.2d 223 (8th Cir. 1986) (holding that a § 2255 movant was not entitled to reconsideration of issues raised in a new trial motion and decided against him on appeal from the denial of that motion); see also *Hill v. United States*, 378 F.2d 44, 46 (6th Cir.) (per curiam), cert. denied, 389 U.S. 884 (1967); *United States v. Szymanski*, 894 F.2d 1337, 1990 WL 6958, *1 (6th Cir. Feb. 1, 1990) (table). Because the Sixth Circuit has thoroughly reviewed these claims by Petitioner in previous actions, this Court should decline to review these matters in this § 2255 action.

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assistance of counsel claim there, the substance of that claim is raised in Issue Seven.

[5]Barrow, 118 F. 3d at 490-94 (finding that the "whole of the evidence on appeal established the unquestionable materiality of defendants' misstatements").

C. Petitioner's Issue Six.

In his Issue Six, Petitioner Barrow asserts that he should not have been held criminally liable for tax evasion based on the diversion of corporate funds where the corporation had no earnings or profits. He cites as support for his theory several tax court cases as well as the Second Circuit's holding in United *States v. d'Agostino*, 145 F.3d 69 (2d Or. 1998). There the court held that "corporate funds lawfully diverted by a shareholder constitute taxable income only to the extent that the corporation had earnings and profits during the tax year in which the diversion occurred." Id. at 72 (citing *DiZenzo v. Commissioner*, 348 F.2d 122, 125 (2d Cir. 1965)). Yet, the Second Circuit recognized that this was not the position of the Sixth Circuit. Id. In *Davis v. United States*, 226 F.2d 331, 335-36 (6th Cir. 1955), cert. denied, 350 U.S. 965 (1956), the Sixth Circuit held that the government is not required to establish the profits or earnings of the corporation from which funds were diverted. It is sufficient to show that the individual taxpayer took and had actual command of the funds. Id.; *United States v. Curtis*, 782 F.2d 593, 596 (6th Cir. 1986); see also *United States v. Williams*, 875 F. 2d 846, 851-52 (11 th Cir. 1989) (explicitly adopting the holding of Davis). The rule announced in *Davis* is still the law of this circuit. Thus, Petitioner's claim is without legal support in this circuit and should be denied on the merits. Alternatively, Petitioner failed to raise this claim in either his direct appeal or his motion for new trial, and has not established cause and actual prejudice for his procedural default.

D. Petitioner's Claims Involving his 1993 Federal Income Tax Return

Petitioner Barrow raises several claims in Issues Two and Three involving the government's introduction and characterization at trial of his 1993 federal income tax-return. In a pretrial motion

in limine, the government sought to introduce this return as evidence of "other wrongful acts" in accordance with Fed. R. Evid. 404(b). On that return, filed jointly with his wife, Petitioner apparently claimed no income for himself. The government maintained that Petitioner did in fact have income that year and therefore the return was fraudulent. After a hearing on the government's motion in limine, this Court allowed the government to introduce the return at trial. This Court gave its limiting instructions as to the use of such evidence after counsels' closing remarks.

Petitioner maintains in Issue Two that his 1993 return was not in fact "fraudulent" under the rule of *d'Agostino*, and therefore the government's reliance upon the return to establish intent was in violation of due process. As already discussed, Petitioner's legal theory regarding the fraudulent nature of his 1993 return should be rejected. Because Petitioner otherwise fails to show that the government's use of his 1993 federal return violated the Sixth Circuit's position announced in *Davis*, his due process claim should be denied.

In his Issue Three, Petitioner asserts that this Court erred in admitting the 1993 federal tax return because it failed to make specific factual findings before ruling on its admissibility. In its pretrial motion in limine the government included as an exhibit Petitioner's purported 1993 federal income tax return. Petitioner responded that the 10

government's intended use of that and other evidence did not comport with Rule 404. It appears this Court assumed this to be a true copy of Petitioner's 1993 federal tax return and went on to review its relevancy, materiality and potential for prejudice. Hearing Transcript (Sept. 13, 1994) at 2-4.
In *United States v. Jobson*, 102 F.3d 214, 220 (6th Cir. 1996), the Sixth Circuit noted that it reviews for clear error a district

court's factual finding that a prior act occurred. Petitioner seems to argue that because the Sixth Circuit does this, it was fatal error for this Court not to make an explicit finding of fact here. This is simply not the case. The Sixth Circuit held in *Jobson* that the district court implicitly found that the prior act had occurred, and that its failure to make this explicit was harmless. *Id.* at 220-21. The government's exhibit appeared on its face to be a true copy of Petitioner's 1993 federal tax return. At no time - either in his response to that motion, at trial, or in his post-trial actions - has Petitioner questioned whether this was in fact a true copy of the federal return he filed for tax year 1993. Because the factual nature of the return has never been called into question, it was harmless error for this Court to find implicitly - rather than on the record - that the purported 1993 federal tax return was a true copy of the actual return filed by Petitioner for that tax year.

Petitioner's essential complaint could be read, however, that this Court should have made a finding on the record regarding the "fraudulent nature" of the return. Yet, there is no requirement that a district court make a legal finding that a particular tax return is indeed "fraudulent" before it can be introduced under Rule 404(b). Because of this, and

given that Petitioner's legal position that this was not a fraudulent return conflicts with the actual law of this circuit, his claim is without merit.

Even if this Court did mistakenly admit the 1993 federal tax return - which the undersigned does not believe to be the case - Petitioner's claims should still fail. As noted by the Seventh Circuit, to obtain post-judgment relief Petitioner "must establish not mistaken admission of evidence, or even a shrieking error in the law of evidence, but that the trial and conviction violate the Constitution." *United States v. Mosley*, 967 F. 2d 242, 243 (7th

Cir. 1992) (citing *Estelle v. McGuire*, 112 S. Ct. 475 (1991)). An issue concerning the admissibility of evidence does not rise to this level unless it can be viewed as so egregious that Petitioner was denied a fundamentally fair trial. *Clemmons v. Sowders*, 34 F.3d 352, 357-58 (6th Cir. 1994); *Davis v. Jabe*, 824 F.2d 483, 487 (6th Cir.), cell. denied, 484 U.S. 988 (1987). In the present case, the 1993 federal return constituted only one of a number of other bad acts introduced at trial. These other acts included: (1) proof that Petitioner had submitted fabricated tax returns to another bank; (2) proof that he had submitted false and misleading financial statements to other banks at other times; (3) proof that he had failed to file federal individual income tax returns for the years 1989 through 1992; (4) proof that he had failed to file federal corporate income tax returns for the fiscal years March 1990 through the trial date; and (5) proof that he had failed to file state income tax returns for 1984 through 1992[6]. If the only other acts evidence introduced at

trial was the 1993 federal return, Petitioner would have a stronger claim. Yet, because the government offered proofs of multiple other bad acts and because Petitioner has not shown that the introduction of the 1993 federal return violated this circuit's holding in *Davis*, he has failed to establish that he was denied a fundamentally fair trial. Petitioner also maintains in Issue Three that this Court failed to give the jury the proper limiting instruction on the use of Rule 404(b) evidence. The Sixth Circuit has given district courts guidance on how to instruct

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[6]In a related issue already reviewed by the Sixth Circuit and therefore not addressed on the merits in this Report, see supra note 2, it appears that Petitioner did indeed file state income tax returns for the years 1985, 1986, 1987 and 1988. The Sixth Circuit found it instructive that even given this,

juries with the proper use of such evidence:

"To apply Rule 404(b) fairly, the district court must carefully identify, in its instructions to the jury, the specific factor named in the rule that is relied upon to justify admission of the other acts evidence, explain why that factor is material, and warn the jurors against using the evidence to draw the inferences expressly forbidden in the first sentence of Rule 404(b)."

United States v. Johnson, 27 F. 3d 1186 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995). In its instructions to the jury this Court stated:

"You have heard testimony and seen evidence that the defendant committed some acts other than the ones charged in the indictment. You cannot consider this testimony as evidence that the defendant committed the acts that he is on trial for now. Instead, you can only consider it in deciding whether he committed those acts knowingly or willfully and not because of mistake or accident. Do not consider it for any other purpose. "

Trial Transcript VIII at 141. This instruction gave the jury the requisite warning not to use the other acts as evidence of Petitioner's guilt for any of the charges listed on the indictment. It noted that such evidence could be used only to show Petitioner's "knowledge or willfulness", the materiality of which were addressed by the Court throughout its instructions. See *id.* at 113, 118-19, 124-25, 138-39. Thus, the dictates of Johnson were met here, and Petitioner's claim should fail.

Finally, as an alternate ground for denying his several claims involving his 1993 Federal income tax return, Petitioner failed to

raise them before the Sixth Circuit during his direct appeal or his appeal from this Court's denial of his motion for a new trial. He states that lit could not do so "because the proof of the falsity of the government's claim did not become available until after the completion of the 1997 examination by the Internal Revenue Service." Even if this were sufficient cause to excuse his procedural default, Petitioner cannot show actual prejudice because this circuit does not subscribe to the same interpretation as that found in *d'Agostino*.

E. Ineffective Assistance of Counsel

In Issues Seven and Eight Petitioner Barrow raises multiple claims of ineffective assistance of both trial and appellate counsel. (Note: While Petitioner appears to raise Sixth Amendment claims in Issues One and Five, the substance of these claims are found in Issues Seven and Eight.) Petitioner raised several such claims in his first motion for new

trial. This court rejected these claims in an order filed February 8, 1995. Petitioner did not appeal that order, but rather filed another motion for new trial. The government contends that because Petitioner failed to appeal the denial of his first motion for a new trial, he has procedurally defaulted his Sixth Amendment claims against trial counsel. Yet, this Court's rejection of these claims in Petitioner's first Rule 33 action should not act as a procedural bar in this collateral action. "Attempting to shoehorn such a claim into a Rule 33 newly discovered evidence motion is not an easy task." *United States v. DeRewal*, 10 F.3d 100, 104 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). Motions for a new trial are "poorly suited" for advancing such claims. Id. Further, Petitioner did raise several claims of ineffective assistance of trial counsel in his appeal from the denial of his second motion for new trial as well

as in his direct appeal. Importantly, the Sixth Circuit noted that such claims are preferably brought in a collateral § 2255 proceeding rather than on direct appeal, and declined to remand or otherwise address the claims. See *Barrow*, 118 F.3d at 494. For these reasons, Petitioner's claims of ineffective assistance of counsel are reviewed on their merits in this Report rather than for "cause and prejudice."

The Supreme Court has established a two prong test for determining whether counsel's performance was so ineffective for Sixth Amendment purposes:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's"

"Second that the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

Strickland v. Washington, 466 U.S. 668, 687 (1984). The standard to be applied is not that of a hypothetical perfect counsel, but that of reasonably effective counsel under prevailing professional norms. *Id.* at 687-88. The fundamental test of effective assistance of counsel is whether counsel "bring(s) to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. The "prejudice" petitioner must show under Strickland is not proof positive that he would have

prevailed but-for counsel's unprofessional conduct. It is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When evaluating counsel's performance under the *Strickland* test, the Sixth Circuit has emphasized that "[a] reviewing court must give a highly deferential scrutiny to counsel's performance." *Ward v. United States*, 995 F.2d 1317, 1321 (6th Cir. 1993). This is based on the well-established principle that legal counsel is presumed competent. *United States v. Osterbrock*, 891 F.2d 1216, 1220 (6th Cir. 1989), afi"d without opinion, 972 F.2d 348 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993). As the Court in *Strickland* stressed:

"it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Strickland, 466 U. S. at 689. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

1. Petitioner's Claims Against Trial Counsel

Petitioner Barrow makes multiple claims of constitutional error against his trial counsel:

7-1 Counsel failed to associate or affiliate with a tax attorney or other tax expert and interview his witness in the tax case as required by professional norms and thereby failed to adequately investigate the tax charges against the defendant. As a consequence, counsel failed to discover that defendant had no Alternative Minimum Tax liability for 1985 or 1986 and defendant's own witness testified against him.

Brief in Support at 63.
Petitioner Barrow maintains that if his trial counsel had consulted with a tax expert, the government's alleged inaccuracies in computing Barrow's income tax owed for 1985 would have been discovered. The government at trial established a tax deficiency through the AMT. At the sentencing hearing, Petitioner Barrow presented the testimony of Neil

Nusholtz, a tax lawyer that did not testify at trial and whom Petitioner hired after trial. Mr. Nusholtz disputed the government's AMT calculation, asserting that it was contrary to IRS rules and regulations. Under his calculations, Mr. Nusholtz asserted that Petitioner had no tax liability for that year.

Yet, Petitioner admits that several days before trial he hired a local CPA, Mr. James Tassoni, to compute his AMT liability. Mr. Tassoni testified at trial that he believed Petitioner owed taxes for 1985, although an amount less than what the government claimed. Petitioner argues that this calculation was wrong and maintains that a fountainhead of errors resulted from Mr. Tassoni's miscalculation.

The Sixth Amendment does not, however, mandate error-free assistance of counsel. Under Strickland, the standard is whether the (1) his counsel's performance was so deficient as to deprive him of the legal assistance guaranteed under the Sixth Amendment; and (2) whether Petitioner was deprived of a fair trial, a "trial whose result is reliable." There is little doubt that Petitioner received a fair trial here. His trial counsel was an experienced white collar defense attorney, as was the counsel brought in to assist. They were joined by a former IRS revenue agent with experience as an expert witness in criminal tax prosecutions, as well as a tax attorney/professor of law and a CPA, both of whom gave expert testimony on Petitioner's behalf. Trial counsel's strategy of focusing on the lack of criminal intent rather than technical tax calculations was a sound and effective one evidenced in part by Petitioner's acquittal on several of the charges. Petitioner's legal team was not deficient in any constitutional sense. See also February 8, 1995 Larder 3-7.

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Further, the Sixth Circuit concluded that Petitioner's new interpretation of the AMT would not likely result in an acquittal. Barrow, 1997 WL 31427 at *2. Thus, any error made by trial counsel or defense expert in calculating Petitioner's AMT for 1985 simply does not rise to the level of a violation of the Sixth Amendment.

7-2 Counsel's failure to affiliate with a tax attorney as required by prevailing professional norms resulted in his failure to adequately investigate the tax charges against the defendant. AS a consequence counsel failed to discover that defendant had no legal tax deficiency under Counts 5 and 6 for 1985 when the government began its tax deficiency computation without first initializing its calculation for errors on the original return in violation of the law contained at IRC §§ 1311, 1314 and § 6211. Brief in Support at 69.

Petitioner asserts here that his convictions for income tax

evasion were in error because the government improperly relied upon the amount shown as tax due on Petitioner's own return when computing the amount of his tax deficiency. Petitioner argues that the government was required to "initialize" its tax computations to account for any errors in Petitioner's original tax return. He contends that if the government had done this, it would have recognized that he had no tax deficiency in 1985. The failure of his counsel to raise this issue at trial allegedly resulted in a violation of Petitioner's Sixth Amendment rights.

The substance of this claim has already been addressed and rejected by this Court and the Sixth Circuit. See May 9, 1996, Order at 6-7; Barrow, 1997 WL at *5.

Specifically, this Court found that "the authority cited by [Petitioner] does not stand for the unusual proposition that the government during a prosecution under 26 U.S.C. § 7201 must prepare a new tax return for the [Petitioner] which correctly computes his tax deficiency. " May 9, 1996, Order at 7 (emphasis in original). Petitioner's arguments in this motion offer no further support for his position. Thus, trial counsel's failure to raise this issue at trial did not violate the Sixth Amendment.

7-3 Trial counsel was deficient when counsel failed to secure an opportunity for defendant to have personal supervised access to exculpatory documents within the government's possession and similarly failed to obtain necessary expert assistance.

Brief in Support at 74.

As noted by the Sixth Circuit and admitted by Petitioner in his motion, trial counsel asked the government twice for Petitioner to have supervised access to the materials in question. Both times the government declined to allow such access, but after the second request, it did permit Mr. Culver, the defense's tax

investigator and a former IRS Revenue Agent, to examine the books. This was certainly enough to meet the requirement that counsel make "reasonable investigations" in defense of the Petitioner. See Strickland, 466 U.S. at 690-91. Petitioner's complaint that counsel did not obtain the necessary expert assistance has already been considered and rejected in this Report.

7-4 Trial counsel was deficient when counsel failed to see that a proper jury instruction was given surrounding the government's use of evidence under Fed. R. Evid. 404(b) and diversion of corporate income.

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Brief in Support at 76.

The underlying substance of this claim - an improper jury instruction regarding Rule 404(b) evidence and the diversion of corporate income - has already been addressed above. See supra Part II. D. This Court gave the proper jury instruction regarding the use of other acts evidence. Further, Petitioner's diversion of corporate income theory is simply not the law of the Sixth Circuit. For these reasons, Petitioner has not shown that his counsel offered ineffective assistance of counsel on this claim.

7-5 Trial counsel was deficient when he failed to perform any acts of investigation; consult a[n] expert or interview any witnesses in preparation for trial and in formulating a strategy on the Counts One and Two and thereby failed to discover and inform the jury of the bank's true position and unimportance of the evidence.

Brief in Support at 76-77.

Petitioner raised this issue on his first motion before this Court for a new trial. The Court stated:

"In the instant case, counsel's tactical decisions cannot be considered deficient. A reasonable decision not to interview potential witnesses is a strategic determination entitled to deference. United States v. Lenna, 987 F.2d 48, 55 (Ist Cir. 1993). The Court finds that counsel had ample resources, including the [Petitioner's] notes and records, and numerous government memorandums of interview to make reasonable decisions regarding further investigation. Further, aside from generalized allegations, [Petitioner] has failed to show any material deficiency in counsel's performance, and that "better lawyering" would have produced a different result at trial. See Ward v. United States, 995 F.2d 1317, 1321 (6th Cir. 1993)."

February 8, 1995, Order at 4-5. Because this issue has already been addressed by this

Court and because Petitioner's § 2255 motion offers little to warrant more extensive treatment, his claim should be rejected for the same reasons cited by this Court in its earlier denial.

7-6 Trial counsel was deficient when his opening and closing statement failed to place the evidence in [perspective] and describe the government's retaliatory genesis of this case.

Brief in Support at 83.

Petitioner asserts in his brief that various federal agencies engaged in a modern-day witch-hunt against him because an earlier investigation involving him had "embarrassed the government." He argues that his defense counsel should have detailed the "retaliatory nature" of the government's actions in

his opening and closing arguments. Yet Petitioner offers no tangible proof to support his accusations. Further, Petitioner admits that when he attempted to raise these issues during his direct examination, the Court, in ruling on an objection, would not allow him to pursue the matters any further. Brief in Support at 85. Thus, defense counsel's decision to focus on the factual and legal issues surrounding the charges rather than Petitioner's beliefs that the federal government was out to get him was within acceptable parameters of reasonable legal strategy.

7-7 Trial counsel's failure to affiliate with a tax attorney as required by prevailing professional norms resulted in his failure to discover that under the tax laws of the United States defendant could have no diversion of corporate income where his accounting firm had negative earnings and profits, a recorded loan and capital account which aggregated more than the amount alleged to have been diverted.

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Brief in Support at 86.

This again is simply a rehashing of Petitioner's theory regarding his 1993 federal income tax return. Because his theory is inconsistent with the law of this circuit, his defense counsel did not provide ineffective assistance of law for failing to present that theory at trial.

2. Petitioner's Claims Against Appellate Counsel

Petitioner raises several claims of ineffective assistance of appellate counsel in Issue Eight of his § 2255 motion. Specifically, Petitioner asserts that:

8-1 Appellate counsel was deficient when he failed to properly raise the meritorious issue and facts surrounding the lack of a

legal tax deficiency resulting from the Alternative Minimum Tax as alleged in Counts 5 and 6.

8-2 Appellate counsel was deficient when counsel failed to raise on direct appeal the trial errors evident and available on the lower court record and described [supra] at Issues Two, Three and Four, Five and Six.

Brief in Support at 88-89.

He contends that appellate counsel agreed to raise these claims on direct appeal, but for whatever reason failed to do so. While Petitioner Barrow requested and was allowed to file a supplemental brief, he believes that the five-page limit did not allow him adequate space to raise and explain each issue.

"When a [petitioner] alleges his appellate counsel rendered ineffective assistance by failing to raise an issue on appeal, [the court] examine[s] the merits of the omitted issue . . . . If the omitted issue is without merit, counsel's failure to raise it 'does not constitute

constitutionally ineffective assistance of counsel.'" *United States v. Cook*, 45 F. 3d 388, 392-93 (10th Cir. 1995) (quoting *United States v. Dixon*, 1 F.3d 1080, 1084 n.5 (10th Cir. 1993), abrogated on other grounds, *Florida v. White*, 119 S. Ct. 1555 (1999). Yet, even if the omitted issue does have merit, that does not imply that appellate counsel rendered ineffective assistance. Effective appellate counsel typically raise only the most promising issues for review rather than every issue of merit. As noted by the Supreme Court, a "brief that raises every colorable issue runs the risk of burying good arguments - those that, in the words of the great advocate John W. Davis, 'go for the jugular,' . . . - in a verbal mound made up of strong and weak contentions."

Jones v. Barnes, 463 U.S. 745, 753 (1983). Tactical choices regarding issues appropriate for appeal are thus properly left to the sound professional judgment of counsel. See *id.* at 753-54; *United States v. Perry*, 908 F.2d 56, 59 (6th Cir.), cert. denied, 498 U.S. 1002 (1990). These principles require that this Court find that a particular omission of appellate counsel was not only ineffective assistance but that the omission prejudiced Petitioner Barrow, thus rendering the appeal fundamentally unfair and the result unreliable. See *Strickland*, 466 U.S. at 687.

In Issue 8-1, Petitioner argues that appellate counsel should have raised the AMT deficiency claim described in Issue One. The Sixth Circuit reviewed the substance of this claim in its review of this Court's denial of the second motion for new trial. It found that Petitioner was merely "attempting to relitigate his case under a new theory by hiring a new lawyer and a new expert" and that the "new evidence" was unlikely to result in an acquittal. See *Barrow*, 1997 WL 31427 at *2. On direct appeal the Sixth Circuit noted that

it had addressed this issue in its earlier decision and declined to reconsider the issue. It is thus apparent that the underlying merits of this claim have been reviewed and rejected by both this Court and the Sixth Circuit. Appellate counsel's decision not to include it in his brief on direct appeal does not render the appeal fundamentally unfair and the result unreliable.

In Issue 8-2, Petitioner asserts that appellate counsel should have raised the claims currently found in his Issues Two through Six. As noted above, the Sixth Circuit has already addressed the claim involving Petitioner's state income tax returns in Issue Two' as well as his claims in Issues Fourg and Five' and therefore Petitioner has not been prejudiced by his appellate counsel's failure to raise them on direct appeal. Petitioner's remaining

claim in Issue Two[7], as well as those in Issues Three[8] and Six[9], involve the government's introduction into evidence of his 1993 federal income tax return. As discussed above in Parts II.C and II.D, Petitioner's position on this is simply not the law of this circuit. These claims are without merit, and it was therefore not ineffective assistance for appellate counsel not to raise them on direct appeal.

III. RECOMMENDATION

For the reasons stated above, Petitioner Tommy Joe Barrow's § 2255 motion to

vacate, set aside or correct his sentence should be DENIED.

Any objections to this Report and Recommendation must be filed within ten (10) days of its service. 28 U. S. C. § 636(b)(1); E. D. Mich. LR 72.1(d)(2). Failure to file objections within the specified time constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ivey v. Wilson*, 832 F.2d 950, 957-58 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless try motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

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[7]See supra note 2.

[8]See supra note 3

[9]See supra note 4.

STEVEN D. PEPE,
UNITED STATES MAGISTRATE JUDE

Dated: JULY 22, 1999
Ann Arbor, Michigan

APPENDIX D

SB DISTRICT COURT' ORDER ACCEPT REPORT AND JUDGEMENT FOR RESPONDENT.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TOMMY BARROW,
Petitioner,

No. 98-CV-72879-DT
No. 93-CR-81042-01

V.

HON. GEORGE E. WOODS

UNITED STATES OF AMERICA,
Respondent.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST FOR CERTIFICATE OF APPEALABILITY

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 15th day of October, 1999.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

On October 8, 1999, this Court dismissed Petitioner's Motion To Vacate, Set Aside Or Correct His Sentence pursuant to 28 U.S.C.§ 2255. Now before the Court is Petitioner's request for a certificate of appealability. For the reasons that follow, this Court finds that a certificate of appealability should issue only on Issue 6, the claim that he should not be held liable for tax evasion based on the diversion of corporate funds where the corporation had no earnings or profits.

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S. C. § 2253 (c) (2). A substantial

showing is met if the petitioner demonstrates that the issues raised are debatable among jurists, that the court could resolve the issues differently, or that the questions deserve to proceed further. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P . 22 (b) .

In his Motion to Vacate, Set Aside or Correct His Sentence, Petitioner argued that his conviction was invalid based on authority from the Tax Court and the Second Circuit. In United States v. d'Agostino, 145 F.3d 69, 72 (2d Cir. 1998), the court held that"corporate funds lawfully diverted by a shareholder constitute taxable income only to the extent that the corporation had earnings and profits during the tax year in which the diversion occurred." In contrast, the Sixth Circuit has held that the government is not required to establish the profits or earnings of

the corporation from which funds were diverted, provided it shows that the individual taxpayer took and had actual command of the funds. Davis v. United States, 226 F.2d 331, 335-36 (1955) ; Accord United States v. Curtis, 782 F.2d 592, 596 (6th Cir. 1986). Although Davis is the law of this circuit, it conflicts with the position adopted by the United States Tax Court in Truesdell v. Commissioner, 89 T.C. 1280, 1294-95 (1987) and the Second Circuit in d'Agostino.

Petitioner did not raise this claim in either his direct appeal or his motion for new trial; however, the Court finds the issue raised implicates a potential miscarriage of justice. Although this is not a case involving an intervening change in the law of this Circuit, Petitioner is in the position of being found guilty of violating the federal statute merely by virtue of his location within the

jurisdiction of the Sixth Circuit as opposed to the Second Circuit.

Accordingly, the Court finds that Petitioner has met the standard articulated in Barefoot. Specifically, this Court is of the opinion that this issue raised in the § 2254 motion is debatable among jurists of reason, and the issue deserves encouragement to proceed further. A certificate of appealability will therefore issue from this Court as to Petitioner's claim that

his conviction for tax evasion based on the diversion of corporate funds in a year where the corporation had no earnings or profits is infirm.

As discussed in the Report and Recommendation adopted by this Court, Petitioner's other claims lack merit and fail to meet the Barefoot standard. Accordingly, a certificate of appealability on those issues is DENIED.

IT IS SO ORDERED.

GEORGE E WOODS,
UNITED STATES DISTRICT JUDGE

APPENDIX F

No. 99-2229
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY JOE BARROW, Petitioner-Appellant,	)	
v.	)	ORDER
	)	MARCH 29, 2000
UNITED STATES OF AMERICA, Respondent-Appellee.	)	

Before: MARTIN, Chief Judge.

Tommy Joe Barrow appeals a district court order denying his motion to vacate sentence filed under 28 U.S.C. § 2255. The district court has granted Barrow a certificate of appealability only for the following issue: whether Barrow should have been held criminally liable for tax evasion based on the diversion of corporate funds where the corporation had no earnings or profits. The receipt of the notice of appeal has been construed as an application for a certificate of appealability under Fed. R. App. P. 22(b) for Barrow's remaining claims. Upon review, the court denies Barrow's application. The Clerk's Office shall issue a briefing schedule as to the issue certified by the district court.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX G

No. 99-2229
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY JOE BARROW, Petitioner-Appellant,	)	
	)	ORDER
V.	)	JUNE 16, 2000
UNITED STATES OF AMERICA, Respondent-Appellee.	)	

Before: JONES, BOGGS, and MOORS, Circuit Judges.

Tommy Joe Barrow moves for rehearing of this court's order entered on March 29, 2000, which denied his application for a certificate of appealability to appeal a district court order denying his motion to vacate sentence filed under 28 U.S.C. § 2255.

Upon consideration, the court concludes that it acted under no misapprehension of law or fact in its prior order. Accordingly, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk